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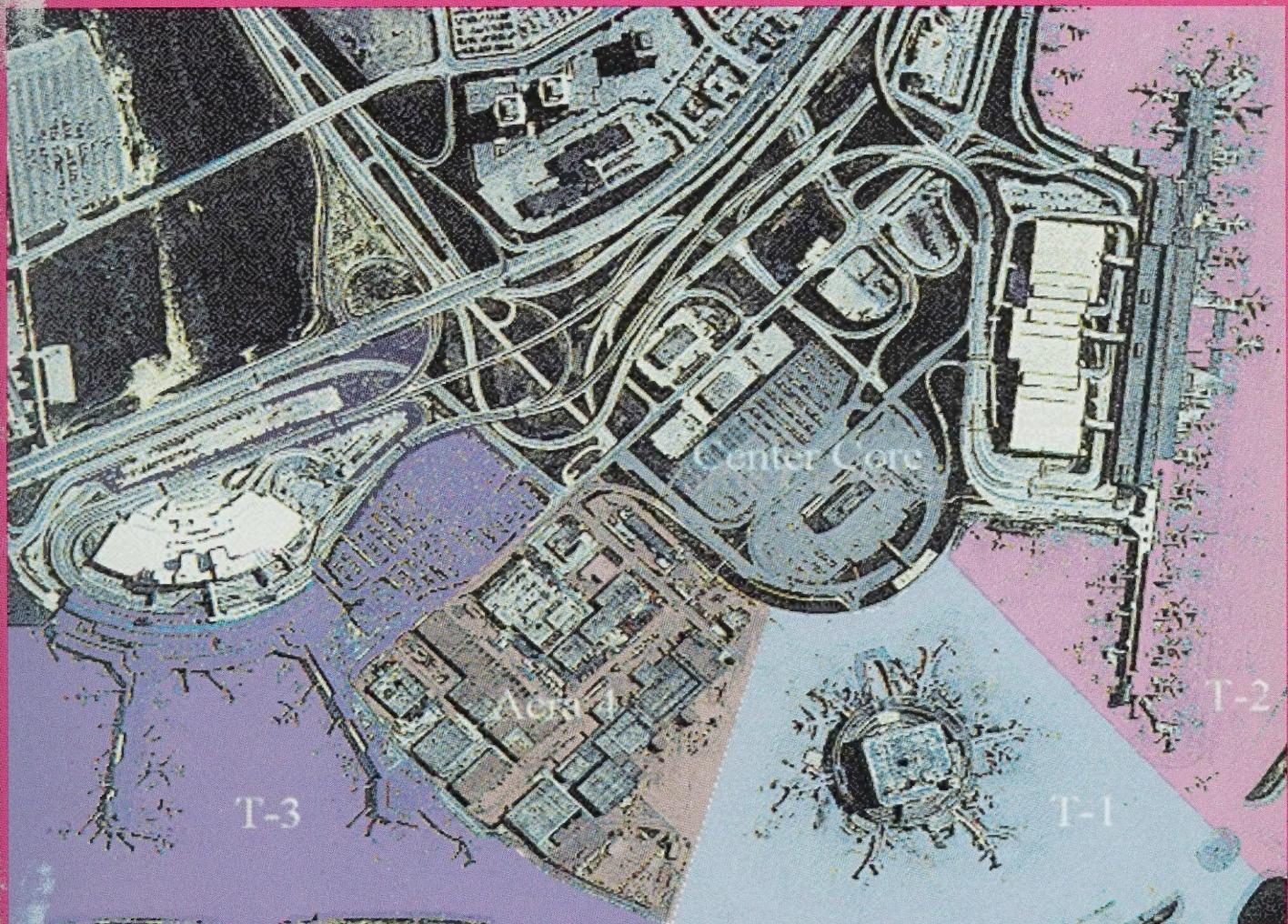
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Senate of Canada



Report of the Special Senate Committee
on the Pearson Airport Agreements

December 1995

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signed as witness to the above

December 1995



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Membership

The Honourable Finlay MacDonald, *Chairman*
The Honourable Michael Kirby, *Deputy Chairman*

The Honourable Senators:

John Bryden
Céline Hervieux-Payette
Duncan Jessiman
Marjory LeBreton
David Tkachuk

* Joyce Fairbairn P.C. (or Alasdair B. Graham)
* John Lynch-Staunton (or Eric A. Berntson)

Original Members agreed to by Motion of the Senate:

The Honourable Senators:

Bryden, Fairbairn P.C. (or Graham) Hervieux-Payette, Jessiman, Kirby, LeBreton, Lynch-Staunton (or Eric A. Berntson), MacDonald (Halifax), Tkachuk

Other Senators who participated in the work of the Committee:

The Honourable Senators:

Adams, Bosa, Carstairs, Doyle, Gigantés, Grafstein, Hébert, Kinsella, Losier-Cool, Poulin, Prud'homme, Robertson, Stewart, Sylvain.

* *Ex officio members*

Order of Reference

Extract from the *Minutes of Proceedings of the Senate*, dated May 4, 1995:

“THAT a special committee of the Senate be appointed to examine and report upon all matters concerning the policies and negotiations leading up to, and including, the agreements respecting the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport and the circumstances relating to the cancellation thereof;

THAT seven Senators, nominated by the Committee of Selection no later than two weeks after adoption of this motion act as members of the special committee, and that three members constitute a quorum;

THAT the committee have power to send for persons, papers and records, to examine witnesses under oath, to report from time to time and to print such papers and evidence from day to day as may be ordered by the committee;

THAT the committee have the power to sit during adjournments of the Senate;

THAT the committee have power to retain the services of professional, clerical, stenographic and such other staff as deemed advisable by the committee;

THAT the committee have power to authorize television and radio broadcasting, as it deems appropriate, of any or all of its proceedings; and

THAT the committee present its final report to the Senate no later than one year following the striking of the committee.

The question being put on the motion, as modified, it was adopted.”

Paul C. Bélisle
Clerk of the Senate

The sworn testimony of the witnesses who appeared before us speaks more strongly of the legitimacy of the process, the benefits of the Pearson contract and the tragedy of its cancellation than this Report can ever do.

Report of the Special Senate Committee on
The Pearson Airport Agreements

The majority of the members of the Special Committee inquiring into the contracts to redevelop Pearson International Airport are unanimous in concluding that these contracts were in the public interest of the people of Canada, and should not have been cancelled by Prime Minister Chrétien. This Report of The Special Committee of the Senate of Canada, which inquired into contracts to redevelop and operate two of the three passenger terminals at Lester B. Pearson International Airport, depicts how rash rhetoric in a federal election campaign became the basis for a rush to judgement.

It was a rush to judgement so flawed it may cost Canadian taxpayers in the millions of dollars. It impugned the reputations of private business people, public servants and politicians. It caused serious financial loss to individuals and companies that had concluded a fair and good deal with the Government of Canada that was in the interest of all Canadians. It has delayed much needed redevelopment of a vital part of Canada's transportation infrastructure, thereby putting the country at an increasing disadvantage in the competitive field of international transportation and thereby jeopardizing its potential economic benefits.

During the 1993 election, Opposition Leader Jean Chrétien said that, if elected, he would have the Pearson deal reviewed and, if necessary, would cancel it. At the time, he was knowingly exploiting innuendo and hyperbole which seeped into the political campaign. His position contrasted with his party's attitude while in Opposition, of either ignoring the redevelopment issue or being privately supportive. Once elected, Mr. Chrétien appointed the Hon. Robert Nixon, a former leader of the Ontario Liberals, to carry out a 30-day review of the development project. Mr. Nixon reported to the Government on November 29th, 1993 and recommended cancellation of the agreements.

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An independent judicial inquiry into the Pearson redevelopment project would have been preferable. But all appeals for this type of review fell on deaf ears. Mr. Nixon's review was based on three weeks of interviews with a week to write the report. The Special Committee learned that Mr. Nixon interviewed 66 persons. At first blush, this sounded impressive, until it was learned that 23 of them were members of the Metro Toronto Liberal Caucus. Mr. Nixon's interviews were conducted in private. The Committee could not obtain details of the interviews from Mr. Nixon, or those who worked with him, as few notes were taken.

The Special Committee heard from all the major private sector participants involved in the redevelopment project, and from former Ministers and the senior public servants who acted on the Government's behalf. Of the 65 witnesses heard under oath by the Special Committee, only 18 had been interviewed by Mr. Nixon. He failed to interview many key Pearson participants from the public and private sectors. Some of his interviews were, on the evidence of the interviewees, so brief as to be cursory or focused on just one or two aspects of the Pearson contract. Faced with the Nixon report, highly damaging statements unworthy of a Minister of the Crown and proposed legislation to prevent the consortiums involved in the Pearson project to sue for recovery of their losses, this Special Committee started hearings last July 11th. It met 30 times.

A parliamentary committee, by definition, is divided along partisan lines. This will undoubtedly be reflected in the different conclusions that Liberal and Conservative senators will draw. Nevertheless, the great achievement of this Special Committee is that it heard more than 130 hours of testimony given under oath by 65 witnesses, including those in the public and private sector most knowledgeable on all of the issues, all of the negotiations and all of the decisions made about Pearson. The facts are on the public record in abundant detail.

This inquiry into the Pearson contracts by the Senate of Canada opened the windows on the deal and became the vehicle for open and public accountability something which the Chrétien Government had not expected and tried to avoid. Despite delays in gaining access to the written record, the withholding of documents and parts of documents, we are satisfied that all essential parts of the record have been subjected to public scrutiny.

The Reasons for the Redevelopment Project

Pearson International ranks among the world's top international airports. It is a vital hub for domestic air travel and for Canada's two largest airlines. More than 800 aircraft from over 60 airlines land and take off every day. Fifty-seven thousand passengers are processed daily at Pearson - more than a third of the Canadian total. More than 40% of all Canadian air cargo passes through Pearson. It is indispensable to Canada's international competitiveness. The existence of a first class airport will attract industry, commerce and

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jobs to Toronto and to Canada. An inferior facility will send investment and jobs to Cleveland, to Pittsburgh, to Detroit, to Chicago.

Successive Federal governments had shied away from the reality that Pearson was the obvious hub for the national air transportation system. They shied away from that reality and because of regional policy, and political baggage from the past, the commitment needed to achieve Pearson's national and international potential was not made until 1989, when the Minister of Transport announced a strategy for developing airports in Southern Ontario. Finally in 1989, the decision was made to upgrade Pearson International as Canada's national and international hub airport.

Problems at Pearson were numerous. Runway capacity was inadequate for existing and projected traffic. There were insufficient air traffic controllers. The parking garage was a problem. Terminals One and Two, which had been designed to handle 12 million passengers a year, were processing 20 million. The number of gates at T2 was inadequate. T1 was described as "chaotic" and a "slum". Regardless of what was done about the runways, the terminals had to be redeveloped without delay.

The government had four options:

- 1) Redevelop the traditional way - that is, spending public money - a difficult choice given the federal government's financial and economic constraints.
- 2) Impose user fees on each passenger using Pearson - not only an unpopular option, but one which would have damaged Pearson's competitiveness.
- 3) Transfer the airport to a local airport authority. Formation of the local authority was - at the time - impeded by political squabbling and was simply not an attainable alternative.
- 4) Lease the two terminals to private sector investors who would redesign, rebuild and operate them, while the federal government retained authority over the management of the overall airport.

The fourth option offered a timely resolution to Pearson's most pressing problems, with no requirement for government capital expenditure, but with continued ownership and regulatory oversight by the Crown. Moreover, a successful precedent to this option had been established with Terminal 3; the federal government had leased the land on which a private sector developer had designed, financed, built and, since 1991, operated Terminal 3 - an enormous undertaking involving \$580 million of private investment. This experience was used in putting together the work plan for the T1/T2 process.

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For these reasons the Government selected the option of leasing Terminals 1 and 2 to qualified private companies, with a strict timetable for their redevelopment and rules for their management in the public interest.

The Process

In March 1992, the Government was ready to announce the request for proposals to redevelop the two terminals. The Request For Proposals had been drafted with assistance from outside consultants over a 17-month period, during which the Government had requested input from interested parties. The evaluation criteria and process were drawn up. Officials from the Departments of Transport and Justice and the National Transportation Agency were involved. The independent investment firm Richardson Greenshields provided professional financial counsel. Price Waterhouse was put in charge of security procedures for the bidding process, and reviewed evaluation criteria and methodology. Raymond Chabot Martin & Paré, the auditing firm, oversaw the process to verify that the terms of reference had been respected. Deloitte & Touche were retained as advisors to evaluate fair rates of return for the developer and the Government.

The Government's evaluation committee worked through July and August of 1992 comparing the bids proposed by Paxport Inc. and the Claridge Group. The evaluation committee submitted its unanimous report to the Deputy Minister of Transport in October and the draft report of the audit group was submitted shortly thereafter. The Paxport proposal was judged the Best Overall Acceptable Proposal. It scored highest on business, development and operational plans.

In December 1992, the government announced that negotiations would begin with Paxport to enter into a contract to redevelop and operate Terminals 1 and 2. Shortly thereafter, Paxport and Claridge came together into a single company, known as T1/T2 Limited Partnership, of which Pearson Development Corporation (PDC) was the managing partner. The rationale for this merger was that business synergies existed between the two developers since the Claridge Group was already the owner-operator of Terminal Three. The Paxport proposal was the more advantageous to the Crown. The merger with Claridge gave the Government added financial reassurance.

Negotiations proceeded through the early months of 1993. By June a non-binding Letter of Intent was signed on the federal government's behalf by the Deputy Minister of Transport and PDC. **By early July, the Government and PDC were so deeply committed to the redevelopment contract that they agreed that October 7th, 1993 would be the closing date. On August 27th, 1993, following Treasury Board approval, an Order-in-Council authorized the Minister of Transport to enter into lease and development agreements with T1/T2 Limited Partnership.**

Chairman's Foreword

Our evidence confirms that with that authorization both the government and the partnership had bound each other to agreements which could not be altered much less cancelled other than by mutual consent. Otherwise, an action in damages against the offending party would certainly have followed.

From August 27 until October 7th, the only activity on the Pearson file was by public servants. There were no further changes requiring approval from Treasury Board, nor was there any ministerial involvement or intervention.

As part of documentation provided to Treasury Board, Deloitte & Touche concluded that the value of the ground lease, between \$800 million and \$900 million in net present value, represented fair market value to the Crown. The rate of return to be achieved by the developer was judged reasonable.

Meanwhile, two events occurred that contributed to the subsequent controversy surrounding the proposed redevelopment project.

New Factors

First there was an international economic recession. Air traffic, which had been increasing rapidly in the 1980's and peaked in 1991, declined sharply. By 1992, there was surplus capacity at Pearson International. As a result, the Government heard advice, mostly from people who were opposed to the terminal redevelopment project, that they should hold off, revisit the plan, and maybe do some interim repairs at the airport.

The Government believed the traffic would increase once the recession ended, and then exceed the record levels of 1991. All available evidence, including projections by Transport Canada and the International Air Transport Association pointed in this direction. The Government was right. With the end of the recession, traffic volumes began returning rapidly to the 1991 highs. Unfortunately the airport facilities were not modernized when traffic volumes were low enough to facilitate this. The private investor also understood the cyclical nature of the airline business and was prepared to proceed. The redevelopment will now have to occur under conditions of congestion. Even if development starts now, it will take at least another seven years to bring Pearson up to world-class standards.

The second event was the formation of a new government under Prime Minister Kim Campbell. The Minister of Transport who had held office under the former Administration since 1991 was reappointed to that post by Ms. Campbell. On 8 September the Prime Minister obtained dissolution of Parliament for an election to be held on 25 October 1993. Still working towards an October 7th closing for the deal, lawyers for both parties drew up the final legal documents in September. Material documents were signed by the parties on October 3rd. and 4th, and put into escrow until October 7th. This was the closing date, established three months earlier.

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During that election campaign, highly partisan rhetoric amplified in the media provoked public opposition to the Pearson redevelopment contract, even though the transaction had survived an elaborate and thorough bidding procedure.

The Birth of an Election Issue

Encouraged by politicians and interest groups, the media suddenly started advancing claims of cronyism and patronage concerning the Pearson deal. It made for banner headlines. Oddly enough, no mention was made of the fact that Claridge, which eventually ended up with two-thirds ownership in the T1/T2 Partnership Ltd., had very strong Liberal connections. On October 5th, Mr. Chrétien made the project an election issue, stating that the contract would be reviewed and, if necessary, cancelled, should he become Prime Minister. On October 7th, Prime Minister Campbell was asked to confirm that the documents should be released from escrow, thus allowing the long-awaited redevelopment to proceed.

There was no doubt as to the government's legal and constitutional right to proceed. Moreover, Prime Minister Campbell had been assured in writing, several weeks previously, by some of Canada's most senior public servants that the selection of the developer had followed an "entirely transparent" competitive process. And, in a memorandum to her that is now part of the public record, these officials added that "we can assure you that officials have reviewed the file and can confirm that due process has been followed at every stage." In addition, refusal by the government would have had significant legal consequences for the Crown. Based on these factors the Government proceeded.

Wholly Unsubstantiated Findings

Following the election, but before his Ministry was sworn in, Mr. Chrétien commissioned the Nixon review which was delivered on schedule and in a document now proven to be riddled with false allegations and innuendo.

Contrary to the outside professional advice given to the previous government, Mr. Nixon found the revenue stream to the Crown "far from overwhelming" and stated that the rate of return to the developer "could well be viewed as excessive."

Mr. Nixon attacked former Prime Minister Campbell for allowing the closing to proceed. He characterized the contract as "inadequate" arrived at in a "flawed process and under the shadow of possible political manipulation." He referred to the "suspicion" that patronage played a major role in the selection of Paxport. He claimed that the activity of lobbyists exceeded "permissible norms." And he spoke of a "perception" that political staff had been interested in the transaction to a highly unusual extent. Not one word of evidence or documentation was advanced by Mr. Nixon in support of these allegations. Nonetheless, Mr. Nixon recommended cancellation of the contract, which Mr. Chrétien announced on

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December 3rd, four days after receiving the report. We find it incredible that no serious consideration was given to alternative options, such as renegotiating the agreements, which would have been far less costly to the people of Canada than the situation in which we find ourselves because of the cancellation.

Since 1993, allegations and insinuations of bid rigging, patronage, undue political interference and excessive lobbying have sullied the reputations of former Prime Ministers, Ministers, politicians, government officials, lobbyists and entrepreneurs involved in the Pearson process. Who was to blame for these gross distortions of truth? The only government report on the subject is Mr. Nixon's report, with its wholly unsubstantiated allegations.

Conclusions Based on the Facts

Upon hearing all the evidence, the majority reached four key conclusions:

1) The Government's Decision to Proceed was Sound

Policy decisions are always open to debate. However, the evidence before the Committee leaves no doubt that, given the urgent need to redevelop Pearson and the limited alternatives available to the Government, the decision to lease Terminals 1 and 2 to highly experienced and competent private developers was sound.

2) The Process was Fair and Impartial

Twenty-six present and former public servants as well as all the outside professional advisors retained by the Government, testified unequivocally that the process was flawless. The evidence overwhelmingly indicates that there was no undue political interference and the influence of lobbyists was negligible.

3) The Contracts Were in the Best Interest of the Canadian Taxpayer

The benefits of the Pearson agreements to the Canadian public were considerable. \$96 million dollars would be invested immediately, and a further \$647 million dollars was to follow in stages over the life of the project. All of this would have been done at no cost to the taxpayer. In addition, the Government would receive millions in lease payments. Thousands of jobs, directly or indirectly, would have been created. An internationally-recognized Canadian participant in the airport development and operations business would have been established. Meanwhile, the rate of return to developers was within reasonable norms. The public servants who worked over many years to find a workable solution to the Pearson mess had every right to be proud of the results they achieved.

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4) Election Campaign Issues vs. Sound Public Policy

All political decision-makers, of whatever party, should recognize an essential lesson from the Pearson experience. Emotions stemming from electoral campaigns are a seriously inadequate basis for responsibly addressing the complexities of sound public policy-making. Furthermore, where campaign commitments are made to review major public policy decisions of a previous Government, this should be done with rigorous detachment from any partisan emotions which may have precipitated the review.

Some Final Thoughts

The need for an inquiry into the cancellation of the Pearson agreements was heightened by serious accusations which have been made during the past two years by the Hon. Douglas Young, the current Minister of Transport. His malicious insinuations, directed at just about everyone involved with these agreements, including former prime ministers and ministers, politicians, government officials, developers and lobbyists among others, demanded an investigation.

The Minister's allegations have been based on a report conclusively demonstrated, by our inquiry, to be riddled with innuendo, unfounded hearsay and groundless suspicions. Yet these statements have done unconscionable harm to the reputations of innocent Canadians. We hope that our report provides these individuals with a measure of vindication, thus addressing the personal side of the cancellation decision as well as its disastrous impact on the public interest.

This inquiry has been long and exhausting. From time to time we have had to express our frustration at the delays in gaining access to the written record, and to the withholding of documents and parts of documents under the cloak of the *Access to Information Act*. In the end, we are satisfied that all essential parts of the record have been produced and subjected to public scrutiny. That record, and the sworn testimony of the witnesses who appeared before us, speak more strongly of the legitimacy of the process, the benefits of the Pearson contract and the tragedy of its cancellation, than this Report can ever do.

Finlay MacDonald
Chairman

Introduction

**“Any deal that was produced was going to
be a good deal or there’d be no deal”**

David Broadbent
Government negotiator

On 4 May 1995, the Senate of Canada established a special committee for the purpose of inquiring broadly into the origins, content and subsequent cancellation of the October 1993 agreements between the Government of Canada and Pearson Development Corporation relating to the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport.

This report presents the findings and conclusions of the majority of Committee members, based on the testimony under oath of more than sixty individuals including those who played major roles in the decision to redevelop the terminals and in developing the agreements. Our hearings commenced in mid-July and continued intensively until early November 1995. We heard evidence from the two Ministers of Transport responsible for the major decisions during the development of the deal, an extensive cross-section of the government officials involved (including all who had exercised senior managerial responsibilities), representatives of the developers, lobbyists, and academics.

The hearings concluded with a lengthy series of meetings with Mr. Robert Nixon, whose report had provided the basis for the present government's cancellation of the agreements, his legal advisor, Mr. Stephen Goudge, and his financial advisor, Mr. Allan Crosbie.

We would like to express our deep appreciation to all who participated in our hearings, in many cases altering their summer plans to do so. We recognize that our inquiry placed senior public servants, in particular, in a potentially awkward position. They must continue to work directly with the present government and retain its trust, in spite of having been obliged to provide evidence refuting most of that government's justifications for cancelling the agreements. We commend the careful professionalism of their analysis and advice during our hearings, which testifies strongly to their capacity to serve governments of all political stripes.

We are also extremely grateful for the valuable contributions made to our work by the Senate Committees Branch, our Counsel and our personal staffs. As well, we thank our research staff from the Library of Parliament, who among other duties provided excellent assistance in drafting this report.

Introduction

Just the Facts

In general, our inquiry has had to respond to two fundamental challenges. The first of these, no doubt apparent to those who watched the daily broadcasts of our televised proceedings, was to determine the facts of an immensely complex process that started over five years ago. The second, equally basic to our mission, was to formulate reasonable standards according to which these facts could be evaluated.

The difficulty of distinguishing what actually happened from rumour, hearsay, groundless suspicion and political opportunism, has faced our inquiry from beginning to end. The task had several dimensions.

First, there was the challenge of sorting through some 45,000 pages, including public service briefing papers, memoranda, notes to file and other documents, along with similar papers from developers and other witnesses. We strove to avoid attributing sinister meanings to words that had often been casually or hastily chosen in draft documents that may have been rewritten before receiving other than narrowly internal use, or not used at all. For example, the word "pressure," which periodically appeared on papers circulated by officials was found to have a prosaic explanation: projects require deadlines, and deadlines make people feel pressed from time to time. As far as we can determine, this reality led to the rumours of "intense political pressure" that dogged the Pearson agreements from the day they were signed.

A second fact-finding challenge arose from the government process for ensuring that cabinet confidences, advice to ministers, solicitor-client advice or other protected information was not revealed in any of the documents provided to our inquiry. This posed a number of on-going problems with, we believe, serious implications for the potential effectiveness of parliamentary committees. Detailed discussion of our specific experience, in this regard, the problems that arose, and our proposed solutions is provided in Part III of this report.

Our lack of access to certain government documents was a particular source of frustration. One such document is a Treasury Board submission, claimed to contain comments critical of the Pearson agreements, which was either leaked or inadvertently provided both to Mr. Nixon and at least one journalist. For reasons set out at the appropriate places below, however, we are satisfied that our failure to gain access to this document has not deprived us of information needed to reach reliable conclusions. Indeed, we took the precaution of recalling several public service witnesses for a hearing on 23 October 1995 during which we raised the concerns which have been attributed to the Treasury Board submission and received detailed, and in our view conclusive, refutations. Lack of access to such documents poses a general threat, however, to the credibility of parliamentary committees, especially those inquiring into concerns founded on suspicions and speculations directly reflecting a lack of complete information.

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A third challenge resulted from the nature of our Committee. Composed according to the rules applying to Senate committees, our Committee had a majority of members from the Progressive Conservative Party and a minority from the Liberal Party; the sharply contrasting majority and minority convictions about the Pearson agreements was apparent virtually from the outset of our hearings. Our challenge was to find ways to work effectively together, despite strongly felt disagreements, and all members can take credit for the Committee's success in this respect. During the hearings, the party sides worked somewhat like the prosecution and defence teams in a judicial proceeding. The complementary lines of questioning developed by each side were fully explored with the various witnesses and, we believe, the body of resulting evidence is closer to being complete than had questions come from a single source.

The Challenge of Reasonable Standards

The second dimension of our task has been to develop reasonable standards for assessing the Pearson agreements and the process that produced them. In our view (supported in detail in Chapter VI), the decision to cancel the agreements suffered fatally from inattention to such standards.

A central requirement of reasonable standards for the Pearson deal is that they be broadly applicable to similar agreements, and the government processes that produce them. It would not be reasonable, for example, to reject the Pearson agreements because of the presence of lobbyists, unless there was demonstrable wrong-doing or illicit influence. Files in the federal Registry of Lobbyists demonstrate that lobbying activity increases in direct proportion to the size of projects. Its level for the Pearson process was normal for a project of this size.

It would not be reasonable to reject the Pearson agreements merely because there were ties of acquaintance, friendship or shared political affiliation between important political or public service decision-makers and developers. The fact that decision-makers know each other or share golf club memberships does not represent a sinister force undermining the health of our political system.

Finally, it would not be reasonable to reject the Pearson agreements because an official who worked on developing them felt uncomfortable or disagreed with government decisions, or felt some pressure to complete the job. These are normal reactions, reflecting the realities that people can differ, in good faith, over issues of public policy and that public officials, like employees in other organizations, may not welcome change.

Throughout our inquiry we applied, we believe consistently, four standards to the Pearson agreements and the process that produced them. In our view, they are standards generally recognized by those who played a role in the process and reflect traditional norms

Introduction

for public life in Canada. They are also the standards to which, for issues other than the Pearson agreements, the current government continues to adhere.

The first and most important standard is ethical: in relation to the Pearson Airport terminals and their redevelopment, did any public official knowingly set aside what he or she believed to be the public interest in order to favour a private interest, at any point during the process or before its inception? If there is evidence of ethical failure in the Pearson agreements, then it should be not merely corrected but the persons responsible should be appropriately punished. On the other hand, if there is no such evidence the punishment of those involved is an injustice which should itself be corrected.

The second standard has to do with the integrity of the process. The essential question is: did political pressures, time constraints or other circumstances, put people in a position that prevented them from performing their duties satisfactorily, or respecting the decision-making authorities and other controls implied in the public service concept of due process? If deficiencies are identified in the integrity of the process, the appropriate response depends on precisely what they are. A knowing attempt to prevent people from performing their duties, for example, might merit a punitive response similar to that reserved for ethical failures, in addition to action to correct the damage. An unintended breach of integrity, such as attempting to complete a task with inadequate staff or material resources, would merit primarily the correction of the damage, either by cancelling the deal or undertaking to renegotiate inadequate aspects.

If no deficiencies are identified at this level, it may still be possible to criticize the Pearson agreements on other grounds; however, the inference that the process which produced them was somehow compromised must be abandoned.

The third standard has to do with public policy. It has to be recognized that people may, in good faith, differ vigorously over what is required by the public interest in any specific circumstance. An incoming government has the right to review its predecessor's actions and amend them, if they conflict significantly with the public interest as conceived by the new government.

Alternatively, at this level, a review might accept the broad public policy thrust of the agreements. In the case of the Pearson deal, this would mean endorsing public sector-private sector partnerships involving the long-term leasing of airport terminals to development consortiums for modernization and operation, with the government retaining responsibility for certain public interests such as safety. In the case of the Pearson agreements, consideration at the level of public policy requires a disciplined review of their provisions and the problems they addressed, without a surreptitious diversion of attention back to suspicions about people or the process. Responsible consideration should also balance the harm done by any identified deficiencies against the costs of remedying them.

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Depending on the conclusion, a review at this level could legitimately have recommended cancellation, renegotiation or retention as concluded in 1993.

The fourth and final standard has to do with the details. The essential question is: are there individual elements or provisions in the Pearson agreements that it is reasonable to believe could be improved significantly? A responsible review here, must involve more than merely singling out certain aspects of the deal for renegotiation. It must take account of the fact that the Pearson agreements reflect a complex trade-off among multiple issues on which the negotiating positions of the Crown and the developers differed. A responsible course of action, if defects were found, might be to initiate talks with the developers in order to explore the likelihood of further gains on certain specific items, or a reshaped pattern of trade-offs. The logic governing this level is unlikely to lead to a justification for wholesale cancellation. It would either identify specific renegotiation issues, or recommend retention of the existing agreements.

The alternative to applying reasonable standards to the Pearson process is the application of arbitrary standards, or private convictions, or fleeting emotional states, or a combination of these.

We believe that in the case of the Pearson agreements, this happened in Canada. In our broader politics, however, we retain the norms of a democratic society: the rule of law and the rights of the individual. These norms provide the basis for a reasonable assessment of the Pearson Agreements. They are also at stake in what the government does as it addresses this issue.

Our Report

This report is our contribution to the resolution of the problems created by the cancellation of the Pearson agreements. It provides recommendations based on a detailed examination of the process and policy decisions that led to the agreements and a careful examination of the reasons for which they were cancelled.

Chapter I, entitled "The Policy Framework," explores the public policy basis for the Pearson agreements. Central attention is given to the government's airport management policy, released in 1987 and refined in 1989 and 1990, which focused on the creation of local authorities to manage major airports, and on increasing the market responsiveness of all airports. The 1989 decision to develop Pearson Airport to maximum capacity, and the experiment in public sector-private sector partnership initiated in 1986 which resulted in the construction of Terminal 3, are also considered.

Chapter II, entitled "The Decision to Redevelop," examines the 1990 decision to modernize Terminals 1 and 2 by means of a competitive process which would invite private sector developers to propose innovative solutions. This decision, announced on 17 October

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1990, grew out of the need for terminal redevelopment at Pearson, which was widely seen to be urgent during the late 1980s, and the public policy thrusts discussed in Chapter I.

Chapter III, entitled "Developing the Request For Proposals," examines the various decisions involved in the development of the Request for Proposals (RFP) document. This document was released on 16 March 1992, and provided developers with the government's project objectives and specific requirements, along with the standards to be used in evaluating proposals and a deadline for their submission.

Chapter IV, entitled "Selecting a Proposal," covers the period between the release of the Request For Proposals and 7 December 1992, when the government announced the result of its evaluation of proposals. During this period, the Department received competing proposals from three consortiums: Paxport, headed by the Matthews Group; Airport Terminals Development Group (ATDG), controlled by Bronfman interests; and Morrison Hershfield, which did not meet deposit and other RFP requirements and was not considered. The proposals that met submission qualifications were then evaluated by means of a highly formal process applied involving application of the criteria set out in the Request For Proposals. This evaluation found that both the Paxport and ATDG proposals were acceptable, but that the Paxport proposal was superior in four of the six rating categories, making it the best overall acceptable proposal. A recommendation to this effect was accepted by the Minister and Cabinet, and publicly announced on 7 December 1992.

Chapter V, entitled "Negotiating the Agreements," covers the period between 7 December 1992 and the concluding of the terminal redevelopment deal on its scheduled closing date of 7 October 1993. During the first phase of this period, as the source of the best overall acceptable proposal, Paxport had first chance at satisfying the government that formal negotiations could begin. Discussions relating to a series of concerns identified during the evaluation process were superseded, however, when Paxport and ATDG created a joint venture. It, in turn, was able to demonstrate to the government's satisfaction that it could obtain the financing needed to carry out the development proposed in the best overall acceptable proposal. During the second phase of this period, the detailed terms of the various agreements involved in the deal were negotiated between the government and Pearson Development Corporation, the joint venture created by Paxport and ATDG. During a third phase, in the fall of 1993, the contractual documents setting out the legal terms of the agreements were finalized and, on October 7, the deal was closed.

In Chapter VI, entitled "Cancellation," we discuss the appointment of Mr. Robert Nixon, following the 25 October election, to review the Pearson deal. After noting the circumstances relating to this appointment, we examine the process and apparent methodology followed by his review during the period between 27 October 1993, when the Prime Minister requested his assistance, and 29 November 1993, when his findings and recommendation were submitted. We then turn to these, examining them in relation to the findings and conclusions established by our own investigation, as outlined in earlier chapters.

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In this light, we assess the decision to cancel the Pearson agreements, announced by the Prime Minister on 3 December 1993.

Our final Chapter, entitled "Conclusions and Recommendations," provides a brief statement of our major findings and four key conclusions that emerge from our inquiry. It provides, as well, the recommendations which we believe are necessary in light of these findings.

We have attached several appendices to this report, in addition to the routine attachments providing details relating to our hearings and other information.

In one of these the Chairman and Deputy Chairman provide an extended discussion of the issues of access to government information that have arisen persistently in the course of our inquiry, and offer some recommendations. The power to send for persons, papers and records is central to the capacity of Parliament to hold government accountable to the people for its actions. They therefore believe that our experience in the course of this inquiry raises issues of fundamental democratic principle.

Given the complexity of the process and the number of participants involved in the development of the Pearson agreements, two reference appendices are included. Appendix B provides a chronology of the events examined in our report. Appendix C provides a 'Who's Who' of the process, identifying many of the individuals who played major roles. We hope that in addition to assisting readers, these appendices may enhance the usefulness of this report as a future reference source.

Finally, we are including for reference a copy of the Nixon report, in Appendix E.

“The idea was that the government would continue to own the land, but would seriously consider any favourable proposals coming forward that would be either transferring ownership to a public body or the transfer of operating responsibility through a lease to a private body.”

Austin Douglas
Transport Canada

The evidence provided by departmental witnesses with respect to the early stages of the Pearson process indicates that standards and guidelines relating to airport terminal redevelopment were not located in a single policy specifically focused on modernizing airport terminals. One must therefore consider the Pearson Agreements in relation to a number of policies, primarily focused on other matters, which (along with the earlier decision to engage a private sector developer to build and operate Terminal 3) provided guidance for the redevelopment of Terminals 1 and 2.

1. Government-wide Initiatives

The desire to make government more business-like, both to enhance responsiveness and effectiveness and to generate efficiencies contributing to deficit reduction had been a major theme of the Progressive Conservative government since its election in 1984. With respect to global transportation policy, this desire was expressed in the July 1985 policy paper *Freedom to Move*, which argued that the structure of detailed regulation built up over the years now formed a barrier to efficiency and global competitiveness and that government needed to do less as a detailed regulator and more as a facilitator¹.

According to one Department of Transport official, within the Department the general theme of commercial orientation was interpreted as aiming to maximize private sector participation in a range of activities traditionally carried out by the Department. In the case of airports, this meant considering expansion of the traditional private sector role of design and construction to include financing and subsequent operation.

1 Transport Canada, *Freedom to Move*, July 1985, foreword, p. 2.

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A related initiative -- the privatization of Crown corporations --took shape in 1986, with the establishment of a cabinet committee on privatization chaired by the Minister of State (Privatization), the Hon. Barbara McDougall, and creation of the Office of Privatization and Regulatory Affairs to provide support and coordination. The objective was to get government out of activities no longer viewed as necessary to meet public policy goals, and to foster greater efficiency, effectiveness and market sensitivity within the corporations by subjecting them directly to market signals.

According to Mr. Victor Barbeau, Assistant Deputy Minister of Transport (Airports) during this period, the privatization policy was not directly considered in decisions about terminal redevelopment². It does, however, indicate the broader policy directions of the government, some of which were reflected in airport policies developed during the late eighties. Similarly, the new emphasis on commercial orientation and performance would be echoed in policies with a specific application to airports.

2. Local Airport Authorities

A) The Mazankowski Task Force

The development of the policy of devolving overall management authority for major airports to local authorities began shortly after the election of 1984. In response to May 1985 budget commitments and Western Canadian dissatisfaction with centralized governmental management of airports, in October 1985, then Transport Minister Donald Mazankowski established a task force composed of representatives of communities, industry and government to examine options for the future role of government in the funding, management and operation of airports³.

In its 1986 report, the task force asserted that Canada's system of airports, while providing generally effective service, was subject to three major problems: large and growing financial deficits, limited responsiveness to local and regional needs, and inefficiencies produced by extensive government involvement. As possible responses to these problems, the task force considered four possible airport management options: private ownership, Crown corporations, locally established airport management authorities, and a commercialized version of public ownership and Transport Canada management.

The task force recommended management by local authorities, with Crown corporations as their second choice. Private sector ownership was eliminated on a series of

2 *Proceedings of the Special Senate Committee on the Pearson Airport Agreements*, Issue number 2, page 37. References to Proceedings cited henceforth as 2:37.

3 Transport Canada, *The Future of Canadian Airport Management*, Report of the Airports Task Force, 1986, p.2.

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grounds, including its potential lack of sensitivity to various publics, inadequate guarantees of increased public responsiveness, potential criticism of government subsidies, difficulties in using profitable airports to subsidize others, and difficulties in implementing federal policies such as cost reduction and bilingualism⁴.

B) The 1987 Policy

The task force recommendations provided the basis for the 1987 Airport Transfer Policy, described by the Minister at that time, the Hon. Douglas Lewis, as "the foundation of the government's approach to the management of airports"⁵.

The policy, entitled "A New Policy Concerning a Future Management Framework For Airports in Canada" and dated 8 April 1987, incorporated two dimensions, one relating to the devolution of management authority for major airports and the other relating to enhancing the commercial orientation of Transport Canada's management of airports remaining under its jurisdiction.

The devolution policy provided that the Minister of Transport would retain authority for safety and security, but would consider proposals from "interested bodies" for the ownership and/or management and operation of airports. The policy is relatively open-ended concerning eligible bodies: provinces, municipalities, local Authorities or Commissions authorized by federal or provincial legislation. "In addition, private sector leasing would be considered"⁶.

The policy sets forth a series of considerations to guide decision-making in response to expressions of interest. The government required that long-term requirements for public funding not increase, that it receive "reasonable compensation" for any facility transferred, and that satisfactory arrangements be negotiated for a series of matters including the transfer of employees, respect of existing leases or contracts, and adherence to federal programs such as Official Languages.

The other dimension of the policy, relating to a commercial orientation for airports retained by Transport Canada, sets out objectives, several of which refer to the need for business-like operations and maximized financial returns. There is also a reference to plans for commercial development, and to the anticipated establishment of a local Airport Advisory Board at each major airport, for the purpose of enhancing its business focus and local responsiveness. Finally, there is a commitment that "avenues for private sector

4 See *Proceedings*, 2:29 and 2:71.

5 See *Proceedings*, 4:5.

6 *The Future of Canadian Airport Management*, op.cit., p. 1.

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investment in traditional and non-traditional airport services would be continually explored and fostered to the maximum extent possible⁷.

The 1987 policy reflects the devolutionary sympathies of the Mazankowski task force, with the exception that it puts forward an unranked range of devolution options (including leasing airports to private sector lessors) in place of the ranked options and exclusion of private sector ownership recommended by the task force. The 1987 policy also goes beyond the issue of managing complete airports to envision an enhanced role for the private sector in aspects of airports which Transport Canada would continue to manage.

We have not been advised of what specific considerations led the 1987 policy to depart from the recommendations of the earlier task force. Officials we questioned stated only that by 1987 there had been further examination of the different ways in which the concept of a local airport authority could be realized⁸.

C) Evolution of the Policy

Departmental officials told us that the Local Airport Authority initiative was recognized as path-breaking and somewhat experimental⁹. After 1987, as experience accumulated, Local Airport Authority (LAA) policy evolved in several respects.

In June 1989, the Department of Transport issued 36 principles supplementing the 1987 policy¹⁰. A preamble states that the Board of Directors of a Local Airport Authority must be appointed through a process "acceptable to the municipalities." The principles do not elaborate on the qualifications required from prospective authorities, but focus on defining their responsibilities, including compliance with federal laws and programs, personnel transfer requirements, safety and security and operational requirements, commercial and financial requirements, and the establishment of a community relations role.

According to Michael Farquhar, Director General, Airport Transfer, Transport Canada, in early 1990 the general requirement for local government support of an applicant for Local Airport Authority status was made more specific. Uncertainty over whether the City of Calgary had clearly expressed support for a prospective airport authority in that area led Transport Canada to formulate a requirement that the "principal local governments" in the region served by an airport each pass a resolution endorsing the structure of a prospective

7 *Ibid.*, p. 4.

8 See *Proceedings*, 2:29-30.

9 See *Proceedings*, 2:37.

10 See *Proceedings*, 2:37.

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authority before the latter could be recognized as an LAA. Unanimous support from every affected local government would, however, not be required¹¹.

3. Southern Ontario Airports - 1989 Strategy

We were advised by Mr. Glen Shortliffe that on becoming Deputy Minister of Transport (April 1988) he had found a serious policy vacuum with respect to Pearson Airport: "The policy positions of successive governments, regardless of party, had been to avoid decisions with respect to Pearson and its future"¹². He believed this avoidance behaviour to reflect, in part, the highly contentious character of airport development issues at the local level.

Decisions about the overall role of Pearson Airport within the regional and national air transport system were needed before more specific issues could be resolved. Thus, a policy review was initiated which would identify options to be considered by ministers. This process led, ultimately, to the August 1989 announcement by Minister of Transport, the Hon. Benoit Bouchard, and the Minister of State for Transport, the Hon. Shirley Martin, of the government's decision to develop Pearson Airport to its maximum capacity, so that it could serve as the primary hub of the national air transportation system into the twenty-first century¹³.

A number of short-term measures were also announced. These included transfers of some charter flights to nearby airports, renovation of Terminals 1 and 2 on a priority basis, two new runways, and increases in the number of air traffic controllers. The rationale for these measures was subsequently provided in greater detail in a January 1990 Transport Canada policy document entitled "Aviation in Southern Ontario - A Strategy for the Future." While the document focuses on recent and projected growth in traffic volumes, and the consequent pressures on runway capacity and air traffic controllers, it also refers to economic penalties incurred by congestion in the air terminal buildings and parking garages at Pearson Airport¹⁴.

11 See *Proceedings*, 5:69.

12 See *Proceedings*, 4:66.

13 See *Proceedings*, 4:67 and *Ministerial Press Release*, No. 98/89, dated August 1989.

14 Transport Canada, *Aviation in Southern Ontario - A Strategy for the Future*, 1990, p. 9.

4. Terminal 3

In addition to the policies outlined above, those considering options for private sector involvement in the Pearson terminals could seek guidance from arrangements at Terminal 3, which had been built by a private sector firm on land acquired under a long-term lease from Transport Canada in 1987.

Departmental witnesses told us that perceptions of the need for a third terminal building at Pearson dated back to the mid-seventies, waxing and waning in importance, as traffic volumes rose and fell in tandem with broader economic cycles¹⁵.

Ascending traffic volumes in 1984 and 1985 returned the issue to prominence. A departmental memorandum¹⁶ dated 15 October 1985 refers to a briefing in March of that year at which officials had reported the urgent need for a third terminal, partly to respond to a surge in traffic beyond forecasted levels during 1984. The Minister, then the Hon. John Crosbie, accepted the case but determined that any new terminal should be provided by the private sector. According to the current Deputy Minister of Transport, Mr. Nick Mulder, this decision also reflected pressures on the Department to slow the growth of government expenditures and awareness that local developers were interested in being involved¹⁷.

In its early stages, at least, the use of private sector developers to finance, construct and operate an air terminal was apparently seen as a one-time arrangement, responding to a unique set of circumstances¹⁸. In view of the complexity of the undertaking and the fact that Transport Canada did not know who the potential developers might be, the Minister decided upon a two-stage proposal-seeking process: a general call for expressions of interest would identify interested developers and canvas them for development concepts; a detailed Request For Proposals would subsequently set out the government's specific requirements to which eligible developers would respond with detailed proposals. These could then be formally evaluated.

The first stage commenced before the finalization of any departmental policies with specific reference to airport development. On 11 September 1986 Minister Crosbie announced that the Department would be issuing a call for Expressions of Interest (EOI). The EOI call, issued later that month, gave a deadline for submissions of 19 November and brought expressions of interest from eight proponents. These were then reviewed within the department, after which five proponents were invited to submit detailed proposals through the issue of a Request For Proposals (RFP) on 18 December 1986.

15 See *Proceedings*, 3:26.

16 *Transport Canada*, October 1985. Committee document, 4-1#1023.

17 See *Proceedings*, 2:41.

18 See *Proceedings*, 2:38.

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Of the five consortiums submitting acceptable EOIs, four submitted proposals by the closing date of 1 May 1987 specified in the RFP. The four proponents were Airport Development Corporation (the construction firm of Huang and Danczkay); Falcon Star (Matthews Group), Bramalea/Wardair; and American Airlines/Cadillac Fairview¹⁹. A request by one group for an extension of the closing date was denied²⁰.

The RFP defined criteria for three main issues: the development concept, the business relationship, and the qualifications of the consortium. Among the criteria related to the business plan, which one of our witnesses estimated accounted for some 40% of the evaluation, was the financial viability of the proposal. We were also advised of the inclusion of a standard clause permitting the government to terminate the search/negotiation process at any point (in which circumstances, proponents might be entitled to seek damages)²¹. As well, the RFP required the posting of a 50% performance bond, and bonds for labour and materials.

Within the Department, a committee of senior officials, supported by private sector engineering, architectural, and financial advisors, was established to evaluate the proposals. As well, an auditing firm (Touche-Ross) was engaged to oversee the evaluation process in addition to providing specialized advice on retail and commercial aspects, among others.

The formal evaluation process resulted in the selection of a preferred proponent, the Airport Development Corporation, with which (following Ministerial and Treasury Board ratification) the government proceeded to negotiate specific arrangements to be embodied in a development agreement.

Following negotiation of the development agreement, Treasury Board approval, preparation of the leases in conformity with the development agreement, Treasury Board approval of the leases, and the signing of the leases in April of 1988, development commenced. Terminal 3, with a capacity of some 10 million arriving and departing passengers, opened for business on 21 February 1991.

Our departmental witnesses were generally positive about the results of the Terminal 3 process. Victor Barbeau, the Assistant Deputy Minister within whose jurisdiction the project fell, reported his confidence that due process had been followed throughout, a view echoed by other public service officials²².

19 See *Proceedings*, 3:28.

20 See *Proceedings*, 3:37.

21 See *Proceedings*, 3:34.

22 See *Proceedings*, 3:44 and 3:37.

5. Observations and Conclusions:

A) The Devolution Policy

From the perspective of 1995, the broad thrust of the airports devolution policy developed during the late 1980s is strikingly contemporary. It attempted to detach the management of airports from the departmental bureaucracy centralized in Ottawa, and create a structure that would be more responsive to local needs and priorities. At the same time, the policy undertook to increase efficiency by fostering a more commercial orientation and increased reliance on the private sector to perform traditional and non-traditional functions. Ottawa's role would be limited to ensuring that broad public interest objectives, such as safety, continued to be met.

During the 1980s, the combination of mounting deficits and the pressures of global competition were obliging all governments to accept that the traditional ways of providing public services were becoming increasingly unsustainable. The broad thrust of the 1987 devolution policy, which focused on meeting public interest objectives while shifting non-essential roles to the private sector, was, during the late 1980s, increasingly adopted by other Western democratic governments as they came to terms with deficit problems and outdated and inefficient administrative mechanisms. In the sphere of airports management and operations, the 1987 devolution policy and its subsequent refinements moved Canada to the leading edge of this trend.

Within Canada, the merit of the policy for airports commercialization and devolution has been recognized by the present government as well as its predecessor. After an extensive review of transport policy following the 1993 election, the current Minister of Transport released the National Airports Policy in July 1994. This policy affirmed the need for a more commercialized transportation system, specifically including airport operations on the list of activities to be made more subject to market discipline and business principles, and indicating that public and private-sector partnerships were among the options to be examined²³.

With respect to airport devolution, officials described the new policy as having "...added on to what were some fundamentals in terms of a local airport authority"²⁴. The central difference was the addition of local and federal government representatives to local airport authority boards, thus modifying the accountability model established by the 1987 policy. The fundamental public policy thrust, however, focusing on the devolution of major airports to local authorities, remained consistent: "the federal

23 Transport Canada, *National Airports Policy*, July 1994, p.2.

24 See *Proceedings*, 2:19.

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government's role in airports will shift ...from owner and operator, to landlord and regulator"²⁵.

Our conclusion is that the merits of the 1987 commercialization and devolution policy speak for themselves, having stood both the test of time and the test of changing governments.

B) The Decision to Develop Pearson

Fundamentally, the decision to develop Pearson Airport was a move to stop avoiding decisions and respond to the pressures of burgeoning air traffic volumes in the late 1980s. These pressures arose, in part, from an earlier cycle of regulatory reform which had led airlines to adopt new operating and pricing strategies and to shift increasingly to "hub and spoke" style operations with frequent flights between strategically located "hub" airports, sustained by passenger flows from local "feeder" airports.

The shift to "hub and spoke" operations reflected the heightened competitive pressures created by deregulation, and enabled airlines to compete effectively in terms of flight frequency, number of destinations and lower prices (a byproduct of optimal aircraft utilization). At Pearson, the new system exaggerated passenger volume pressures already present more broadly within the system, and increased the need for the efficient handling of passengers. Pearson's emerging role as a "hub" meant that delays there could result in backed-up traffic in, for example, Halifax, Vancouver, Edmonton, Calgary, Winnipeg, Ottawa and Montréal, and grounded flights in London, Paris, Frankfurt and Tokyo²⁶.

The major alternative "hub" airport site available in the Toronto region was the Pickering site. The 1990 Transport Canada policy paper explaining the decision to develop Pearson Airport indicated that this alternative had been adopted in 1968. Development was halted in 1975, however, because of intense public controversy and the provincial government's decision not to provide the roads and utilities required to service the site. According to Mr. Glen Shortliffe, who provided us with an overview of background policy issues, successive ministers and governments attempted to redirect traffic through Mirabel Airport, but without success²⁷. An attempt to revive the Pickering site in the late 1980s would very likely have led to a repetition of the same strife that had brought it to a halt in the mid-1970s, compounded by concerns about the expenditure of public money to create another Mirabel-style "white elephant."

25 See *Proceedings*, 4:86.

26 See *Proceedings*, 4:91.

27 *Report of the Auditor General*, October 1990. See also *Proceedings* 30:12 and 30:28 ff.

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The deregulation reforms of the mid-1980s freed the airlines to respond to the marketplace. By the late 1980s, the marketplace had made a clear decision about where airport development was needed; all that remained was for the government to recognize that fact. In our view, this recognition led to the decision to develop Pearson International Airport.

C) Terminal Three

The long-term lease of land to the development firm Huang and Danczkay for the purpose of constructing Terminal 3 was a very early government response to the systemic pressures and constraints that would result in a more formal policy response later in the 1980s. It provided a kind of early test-case for some of the ideas that would find their way into the 1987 local airport authority policy, particularly the enhanced involvement of the private sector in order to increase market responsiveness and efficiency.

Pearson Airport's Terminal 3 was not yet open when it was first announced that proposals for redeveloping the other terminals would be sought. Terminal 3 was, however, near enough to completion to provide tangible evidence that the public sector-private sector partnership model was workable. The fact that development had occurred at all established that public sector and private sector objectives relating to airport terminals were not necessarily opposed and could even be mutually supporting. All that was needed was some imagination on both sides, and a willingness to question traditional thinking.

Our conclusion is that, by 1987, when the initial devolution policy was developed, Terminal 3 had established the fundamentally important precedent that public and private sector partnerships were a workable option for airport terminal development. This precedent provided tangible support for the commercialization emphasis in that policy.

D) Auditor General's Report

In his 1990 report, the Auditor General of Canada included some criticisms of Transport Canada policy. Among the targets were the lack of an overall strategy to respond to the impacts of deregulation (including increased volumes of traffic, which were already apparent in the United States); the lack of a policy statement and financing philosophy supported by an analysis of the implications of increased use of private sector financing for terminal development; and the lack of a comprehensive plan for funding infrastructural development at airports.²⁸

These criticisms point to a broader challenge faced by Department of Transport during the late 1980s: how to respond to the new requirements of strategic policy-making

28 *Report of the Auditor General*, October 1990, 30:12 and 30:28 ff.

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in areas such as airport devolution when the staff's primary strengths were grounded in the hands-on administration and management of airports.

The 1987 devolution policy faithfully reflected both the strengths and the weaknesses implicit in this situation. Considered along with its later supplements, this policy is extremely detailed with respect to administrative matters, such as the respective duties of the government and a local airport authority. It is, however, much vaguer with respect to, for example, the criteria to be employed in granting official status to Local Airport Authorities. As will be seen later on, this vagueness was to be source of persisting problems and confusion.

In fairness, it must be recognized that other departments also faced new policy-making challenges during this time. Many of these were also criticized by the Auditor General. In general, line departments whose traditional focus had been the provision of administrative and service-delivery functions had special difficulties in responding to the new realities suggested in phrases such as "reinventing government."

On balance, the technical quality of the Department of Transport policy framework left room for improvement, but was consistent with governmental norms. It should be recognized as an innovative first attempt at dealing with such new challenges as airport devolution.

E) Conclusions

The 1987 airports devolution policy, with its new focus on commercial orientation and private sector involvement, did more than provide an imaginative solution to problems relating to Transport Canada's role in managing airports in the mid-1980s. **It anticipated broader initiatives of the 1990s, including the program review of 1994-5 with its comprehensive attempt to focus more tightly the role of government in the economy.**

In our view, the public servants responsible for the emerging airports policy during the 1980s should feel a sense of real accomplishment at having implemented the vitally important first steps in a new direction for this policy sector. Equally, the public policy vision that provided guidance to officials should be recognized for what it was, a prescient anticipation of the realities of the 1990s.

"I said if there is any delay in getting on with renovating terminals 1 and 2 then I would suggest you board it up"

Hazel McCallion
Mayor of Mississauga

"The ideal time frame to have commenced the redevelopment was in 1993 while passenger numbers were down..."

David Robinson
Air Canada

The decision to seek private sector proposals for the modernization of Terminals 1 and 2 emerged in the late 1980s from the consideration of circumstances at Pearson in the light of the objectives and priorities in the government's policy framework.

A key consideration for decision-makers was the condition of the terminals, especially in combination with passenger volume pressures. Unsolicited proposals from various developers testified to a high level of interest in private sector involvement, as did the engagement of lobbyists to promote various individual proposals. Efforts to form a Toronto local airport authority also had to be taken into account, since such an authority would have been able to assume responsibility for terminal development decisions.

1. Pearson Airport in the Late 1980s

Witnesses appearing before us were in general agreement that, as of the late 1980s, Pearson Airport was experiencing some significant problems. Indeed any traveller could draw this conclusion from the sometimes lengthy delays in the air and queues and other inconveniences on the ground.

Perhaps the most outspoken of our witnesses was Mr. Glen Shortliffe, whose overview from his position as Deputy Minister of Transport led him to conclude that, as of 1988: "Pearson was a mess. It was a disgrace. And worst of all, it was not working"²⁹. Among the problems cited were too few air traffic controllers for existing traffic, let alone projected increases, and the inadequate capacity of the runways. Finally, Terminal 1 had deteriorated to the level of "a slum," with a parking garage that was frequently closed, while

29 See *Proceedings*, 4:64.

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Terminal 2 had too few gates. Refurbishment of the terminals would have been needed, according to Mr. Shortliffe, irrespective of what was done concerning controllers and runways³⁰.

The Hon. Douglas Lewis, Minister of Transport at the close of this period (1990), agreed with Mr. Shortliffe. He told us that the two terminals had been designed to handle up to 12 million passengers per year, but in 1990 were handling 20 million. Overstrained facilities had resulted in a range of on-ground delays, difficulties in obtaining cabs, line-ups at Customs desks, and general overcrowding. We did not hear from Mr. Lewis' immediate predecessor, the Hon. Benoit Bouchard, but his reference to the redevelopment of Terminals 1 and 2 in his policy statement of 18 August 1989 suggests that his view of the situation was the same.

Other witnesses, some of whom would later disagree with the government over how terminal redevelopment should take place, appear to have broadly agreed with the Minister and senior officials as of the late 1980s. Mr. Gerald Meizner, a recent President of the Metropolitan Toronto Board of Trade and Chairman of the Task Force that set up the organization that would later seek local airport authority status, advised us that Pearson was perceived as a "model of neglect," and general capacity problems appeared to be urgent during the late 1980s³¹. As recession took hold, however, the sense of urgency diminished and those organizing a local airport authority felt that they could benefit from this to perfect the organizational aspect³².

As the main occupant of Terminal 2, Air Canada was a central client of Transport Canada and a key player in determining redevelopment requirements. According to our Air Canada witnesses, as traffic grew in the late 1980s, and it became clear that Terminal 3 would be giving a competitive edge to airlines serviced there, Air Canada developed a two-phase master plan for refurbishing Terminal 2³³.

Phase one construction, co-financed by Air Canada and Transport Canada and focusing on refurbishing the domestic wing, was launched in 1989 and would be completed by 1991. With respect to the second phase, which dealt with international traffic, it was clear by 1989 that Transport Canada could not provide funding. As a result, Air Canada reviewed unsolicited proposals from several private sector developers interested in underwriting redevelopment costs and, in June of 1990, conveyed its support for the Paxport proposal to Transport Canada. In 1989 and 1990, Air Canada's basic position was that "...we wanted to

30 See *Proceedings*, 4:80.

31 See *Proceedings*, 5:58.

32 See *Proceedings*, 5:21.

33 See *Proceedings*, 12:75.

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have a fix for the terminal"³⁴. Relations with governments and potential alternative participants appear to have been consistently managed, and in some cases initiated, in the light of this objective.

2. Developer Initiatives

A) Unsolicited Proposals

Unsolicited proposals related to either Terminal 2 on its own, or the Terminals 1 and 2 combination, began to arrive in ministerial offices early in 1989. The early proposals were submitted by firms with established interests in Pearson Airport, and reflected their perception that immediate action was needed.

The first of five unsolicited proposals of which we were told arrived in March of 1989 and was submitted by the Airport Development Corporation. This firm had been established by the construction firm of Huang & Danczkay, which had built Terminal 3. In May 1989, Air Canada also submitted a proposal, focused on its requirements in Terminal 2.

In the fall of 1989, the Minister of Transport received several additional unsolicited proposals, prompted by the support for private sector involvement implicit in the ministerial policy statement on the need to expand capacity at Pearson (18 August 1989).

In September 1989, a proposal was received from Paxport Inc., a consortium formed in early summer of 1989 as a joint venture between the Matthews Group and Bramalea Inc³⁵.

In early 1990, a proposal came from Canadian Airports Limited (a consortium whose major component was British Airports Authority PLC)³⁶. In addition, in June 1990, Air Canada submitted a proposal developed by Paxport, along with a statement of Air Canada's support.

We were advised by a Department of Transport official that unsolicited proposals typically have little impact on decision-making, because there has been no formal bidding process with requirements made public to all interested parties. We heard that the unsolicited proposals for the redevelopment of Terminals 1 and 2 followed the typical pattern. They sat on a shelf until it was decided to proceed with terminal redevelopment by means of a formal request for proposals to private sector developers. They were then

34 See *Proceedings*, 12:85.

35 See *Proceedings*, 8:80 and 9:22.

36 See *Proceedings*, 6:42.

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consulted by officials who were defining technical options while preparing a Request For Proposals³⁷.

B) Follow-up Activities

Testimony indicates that the developers did not merely submit unsolicited proposals to the government and passively await a response. On the contrary, they undertook a wide-ranging campaign to recruit support both within the government and among other Pearson airport stakeholders. The existence of such a campaign was fully apparent to the Minister of the day, whose general comment on lobbying was: "it's a fact of life. ... (but) nobody, no government, whether it's Liberal, Conservative or whatever, wants to be beholden to lobbyists on things"³⁸.

We heard about the efforts of Paxport in great detail. This reflects the fact that Mr. Raymond Hession, the first President of Paxport, was questioned closely on Paxport's activities because Paxport's proposal had been judged the best overall. We found Mr. Hession to be a very forthcoming and cooperative witness, even supplying personal diaries for our scrutiny. Soon after its creation Paxport actively sought support from Air Canada. It focused on the government's financial incapacity to undertake enough development in Terminal 2 to ensure that Air Canada need not fear losing a competitive edge to airlines using the soon-to-be opened Terminal 3³⁹.

As a result of this initiative, Paxport enjoyed a positive relationship with Air Canada, initially reflected in the airline's support for Paxport's unsolicited proposal. On 1 June 1990, Mr. Jeanniot, then President of Air Canada, wrote to Minister Lewis referring to a meeting of June 4 at which Air Canada had expressed support for the Paxport unsolicited proposal. The letter also conveyed Air Canada's strong opposition to a competitive bidding process which could result in the acceptance of a high cost proposal for redevelopment with costs passed on to Air Canada as tenant.⁴⁰

As well, internal Paxport documents made available to us suggest that a joint lobbying campaign was developed at subsequent meetings between Air Canada and Paxport officials. This identified Ministers and officials to be targeted and set out issues to be addressed during August and September 1990, immediately before a cabinet meeting was scheduled to consider proposals from Minister Lewis⁴¹.

37 See *Proceedings*, 2:45 and 6:45.

38 See *Proceedings*, 4:19.

39 See *Proceedings*, 9:24.

40 See *Proceedings*, 12:115.

41 See *Proceedings*, 9:26.

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More broadly, Mr. Hession indicated that the progress of decision-making within the government on the terminal redevelopment issue was also closely monitored during this period. A memorandum dated 12 July 1990 provides a summary for Paxport executives of what is described as a "full debriefing" which Mr. Neville (a Paxport lobbyist) had received from Mr. Warren Everson, an executive assistant to the Minister of State for Transport the Hon. Shirley Martin, concerning discussions at a meeting of the Priorities and Planning Committee of Cabinet the previous week. Among issues covered in the memorandum are the Pearson-related issues which the Government intended to address; the Minister's resistance to the non-competitive process of developer selection promoted in various unsolicited proposals, including one from Air Canada/Paxport; advice from Department of Transport officials that a major expansion of Terminals 1 and 2 was not urgently needed; and the structure of the competitive process of developer selection being considered. According to Mr. Hession, this information concerned issues widely under discussion at this time within the Department, and was not of earth-shattering importance.

Mr. Hession undertook to meet with the full range of stakeholders to sell the idea that Terminals 1 and 2 needed redevelopment, and that the Paxport proposal represented the most effective way to do this. Among those contacted were the CEOs of major Toronto companies, "some of whom, I am happy to say, wrote to the minister, as indeed you heard Mr. Lewis say, saying, 'Yes, let's get on with it'"⁴²

While we have not received equally detailed information from those who submitted other unsolicited proposals, it is reasonable to assume that they, too, were active in promoting their ideas, both directly to public officials, and indirectly to and through municipal governments, Pearson tenants and users.

It is also reasonable to assume that these efforts by developers reinforced the impression of federal officials and politicians that Terminals 1 and 2 were urgently in need of attention. At the same time, both officials and politicians report that they were fully aware that an active lobby had emerged. They have, however, expressed their confidence that this did not alter the course of events, partly because developers were not solely responsible. The Toronto Board of Trade, for example, had organized a letter-writing campaign by its members and sent the Minister the results.

3. Local Airport Authority Initiatives

As has been seen, the 1987 policy on the devolution of management authority for airports, to local groups, left it to such groups to establish potential local airport authorities, obtain sufficient support from affected municipal governments, and seek recognition from Transport Canada. By early 1990, groups had been recognized for negotiation purposes in

42 See *Proceedings*, 8:81.

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a number of communities, and negotiations ultimately to result in local airport authorities were underway for Edmonton, Calgary, Montreal and Vancouver.

As of 1990, attempts to organize a local airport authority in Toronto remained unsuccessful, despite the encouragement of the Metropolitan Toronto Board of Trade since the mid 1970s⁴³. According to Mr. Gary Harrema, Chair of the Durham Regional Council throughout this period, the 1987 devolution policy and a desire to keep up with Vancouver and Montreal spurred the business community in the Toronto region to make a strong push for a local airport authority. The political impediments were, however, considerably more significant for the Greater Toronto Area than elsewhere, because of the governmental structure, or more accurately its absence. Five regional municipalities, containing some 35 local governments, had to come together in support of the initiative, and "...it took a long time to get that orchestrated because we don't have a party system"⁴⁴.

By 1989, according to Mr. Gardner Church, at that time Ontario's Deputy Minister for the Greater Toronto Area, there were "the beginnings of some momentum" towards a local airport authority among the heads of regional councils in the Toronto area. In 1990, agreement was achieved among the regional councils on "the framework for an airport authority," and efforts were launched to establish a board of appropriate nominees⁴⁵. According to Mr. Church, as of mid- to late 1990, the main issue between regional council heads and the federal government concerned the federal view that elected politicians should not sit on local airport authority boards (seen, at the local level, as an impediment to political accountability)⁴⁶.

Mr. Church went on to acknowledge that, new "momentum" notwithstanding, Toronto continued to lag behind communities such as Vancouver and Pittsburgh with respect to airport development and a range of other infrastructure issues into the early nineties.⁴⁷ Nor could this problem be blamed on the federal government or its local airport authority recognition policy:

I don't think there's any question that Toronto was slow off the mark, and any suggestion that that was the fault of the federal government is simply wrong.⁴⁸

43 See *Proceedings*, 5:37.

44 See *Proceedings*, 5:37 and 5:16.

45 See *Proceedings*, 5:43.

46 See *Proceedings*, 5:13.

47 See *Proceedings*, 5:42

48 See *Proceedings*, 5:54

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Briefing materials provided to heads of the various municipal councils attempting to establish a local airport authority make it clear that, even late in 1990, these efforts were at a very preliminary stage. A memorandum from Mr. D.A. Lychak, City Manager of Mississauga, sent to heads of council on 3 December 1990, before a meeting scheduled with Minister Lewis, states that "it would be impossible to bring a unified position to the Minister, since we are in the very early stages of our LAA analysis." The memorandum went on to recommend that heads of council express concern to the Minister about the possible implications of the Terminals 1 and 2 redevelopment project for the financial viability of any future local airport authority, and move with urgency to create a 21-person task force to pursue base case LAA studies relating to Pearson Airport, the Pickering lands, Hamilton Airport, and Toronto Island Airport⁴⁹.

4. The Decision to Proceed with Redevelopment

Early in 1990, as a follow-up to the announcement of the 1989 Southern Ontario airport strategy, the Department of Transport released a policy document containing traffic flow projections for Pearson Airport. According to these projections, annual aircraft traffic volume would increase from 348,000 in 1988 to between 356,000 and 485,000 by 1996, and between 379,000 and 541,000 by 2001. These increases would come on top of the increase from 240,000 to 348,000 between 1983 and 1988, which reflected an increase in passenger volumes of approximately 40%, from 14 million to 20 million people. All these passengers were processed through Terminals 1 and 2, which had been designed to handle 12 million passengers a year; Terminal 3, with its 10 million passenger capacity, had not yet become operational. Reflecting this situation, the study referred to "congestion problems that occur in the terminal buildings, the parking garages, and the loss of conventions to the Toronto area"⁵⁰. As well, the study estimated that by 1996 the existing runway system would not be able to support anticipated demand.

According to Minister Lewis, anecdotal evidence of problems at Pearson continued to arrive at his office with some frequency during this period: "from the day I was appointed to the day I left, there was hardly a day when it wasn't brought to my attention that there was a need to 'fix Pearson'".⁵¹ He specifically referred to complaints from the Metropolitan Toronto Board of Trade, provincial and local governments, and business users of the airport⁵².

In the early fall of 1990, it remained Minister Lewis's view that Pearson users and tenants generally agreed that the airport was "out-stressed, unsafe, unreliable and an

49 See *Proceedings*, 4:54.

50 Transport Canada, *Aviation in Southern Ontario - A Strategy for the Future*, January 1990, p. 9.

51 See *Proceedings*, 4:6.

52 See *Proceedings*, 4:7.

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embarrassment to Canada"⁵³. Convinced that the voters were demanding action, and that inaction was causing economic damage to the Toronto region, the government decided to proceed directly with a program to upgrade the airport. A central requirement for any proposal would be that it "fix the problem quickly and properly"⁵⁴.

At the time of this decision, the government was aware of the views of representatives of the Greater Toronto Area, who were calling for decisions about development to be postponed so that this authority could deal with them. It was the Minister's view, however, that the whole airport transfer initiative, even in locations where discussions were proceeding relatively smoothly, "was going very, very slowly. After more than three years, none of these initiatives was anywhere near fruition"⁵⁵. In what was viewed as a unique situation in Toronto, the municipalities and the Greater Toronto Area had not achieved agreement on how a local airport authority would work. To the Minister, the Local Airport Authority route "just didn't seem like a viable alternative"⁵⁶.

Funding also posed a problem. The government did not consider itself able to provide this from general revenues, given fiscal pressures at that time. The main government funding alternative -- generating the financing by levying a charge on terminal users (passenger facility charge) -- was not seen as politically acceptable, given the intensity of public reaction, then at its height, to the GST. Also, the combination of public sector and private sector terminals at Pearson Airport would have made it difficult to implement such a fee⁵⁷.

As well, the decision to proceed required consideration of several interrelated problems, including runway capacity, the environmental impact of increases in runways and traffic volume, and terminals. According to Minister Lewis, the relation between runway and terminal enhancement was regarded as a "which comes first, the chicken or the egg" problem to be best addressed by moving on both. Action on the terminals would thus take place at the same time as the environmental impact assessment required before runway construction could take place⁵⁸.

Since the local airport authority option was not attainable in the case of Pearson at this time, a private sector option to lease, renovate and operate seemed to be the only possibility. During his appearance before us, Minister Lewis stressed several arguments in

53 See *Proceedings*, 4:8.

54 See *Proceedings*, 4:8.

55 See *Proceedings*, 4:9.

56 See *Proceedings*, 4:10.

57 See *Proceedings*, 4:9.

58 See *Proceedings*, 4:6.

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favour of this option, which was not an entirely new idea, but rather extended the concept of airport leases already widely practised in the system. It would provide a timely resolution to the problems of Terminal 1 and 2, and would follow the pattern of Terminal 3, which "didn't cost the Canadian taxpayer a dime"⁵⁹. As well, continued Crown ownership would permit regulatory oversight with respect to safety and security, while enabling private sector efficiencies to be achieved in other areas.

The announcement that the government would seek private sector proposals for the refurbishment of Terminals 1 and 2 was made on 17 October 1990. The next day, Minister Lewis informed interested developers of the urgency of the situation, and of the cabinet decision to fast-track the project so that renovations could be completed as quickly as possible. According to the Minister, the initiative was then handed over (save for major policy decisions which would be referred back to ministers from time to time) to departmental officials who were to develop a formal Request For Proposals setting out in substantial detail what the government was seeking and the criteria for evaluating proposals.

5. Observations and Conclusions

A) Process

One of the most serious allegations made in connection with the Pearson Agreements is that these reflect the fact that the ability of public officials to perform their duties was in some way compromised, either by lobbyists or by inappropriate pressures from the political level.

As for other stages of this process, we systematically asked officials who had had significant responsibilities relating to the decision to invite private sector proposals for their views on this process. In particular, we asked whether they personally believed they had been subjected to requirements for speed which compromised their work, or to interference from the political level; whether lobbyists had influenced their decisions; and whether, more generally, they were satisfied that the requirements of due process had been met.

Without exception, responsible officials endorsed the process in which they had participated. In particular, the process up to the public announcement that private sector proposals would be sought was endorsed by the Hon. Douglas Lewis, Minister of Transport during this period; Mr. Glen Shortliffe, who was Deputy Minister of Transport for all but the final months of this period⁶⁰; Mrs. Huguette Labelle, Deputy

59 See *Proceedings*, 4:10.

60 See *Proceedings*, 4:92.

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Minister for several months at the end of the period⁶¹; and Victor Barbeau, Assistant Deputy Minister, Airports.⁶²

With respect to any influence by lobbyists, the comments of Mr. Shortliffe were particularly direct: "I must say, sir, that I have watched over a number of years a lot of lobbyists get paid a lot of money and their actual influence on the way projects are developed, negotiated or decided upon is zip"⁶³.

Our evidence would suggest that lobbyists were rather more effective, however, in gaining access to timely information about the status of government decision-making on matters of interest to their employers. While information-gathering is not influence, and its occurrence does not compromise the decisions which ultimately emerged, we think that it is appropriate to sound a cautionary note to the staffs of ministers and others who may be privy to confidential Cabinet discussions. Wherever there are people who know things and others who are curious, there will be those who succumb to the temptation to enlarge their sense of personal importance, however temporarily. The actual disclosure of cabinet confidences is, however, an infraction of the law and those who cross this boundary are subject to prosecution.

In our hearings, we found no evidence to contradict participants' unanimous affirmation of the complete integrity of the process leading up to and including the decision to seek proposals from the private sector. Our conclusion is that the process fully enabled the democratically elected representatives of the people to serve the public interest as they perceived it.

B) Policy

In 1990, two basic issues relating to Terminals 1 and 2 at Pearson Airport faced Minister Lewis and the government. The first issue was whether they needed redevelopment at all. If they did, how should redevelopment be financed, how should it be carried out, what should be the involvement of the private sector (if any) and how should it be achieved? These issues require discussion in sequence.

(i) Was Redevelopment Needed?

There seems to have been virtual unanimity, during the late 1980s, that Terminals 1 and 2 at Pearson Airport should be modernized. As our hearings have established, the recognition of the need for modernization was common to Air Canada, those attempting to

61 See *Proceedings*, 8:39.

62 See *Proceedings*, 3:43.

63 See *Proceedings*, 4:92.

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establish a local airport authority, developers and the federal government. The need for development was thus not in dispute, though its timing and pace was. In the words of Mississauga Mayor Hazel McCallion, whose comments reflect perceptions as of the early 1990s in the municipality most directly affected by Pearson and most immediately familiar with it:

I said if there is any delay in getting on with renovating Terminals 1 and 2 then I would suggest you board it up⁶⁴.

We have heard no evidence that would contradict, five years after the fact, the unanimous verdict of those who knew Pearson Airport best: those who worked in it and used it on a daily basis. Our conclusion is that the government's decision to include Terminals 1 and 2 in its broader development program responded directly to the expressed needs of its users.

The decision also responded to the pattern of emerging demand in airport traffic, as recognized in the 1989 ministerial strategy and the 1990 policy study that supported it. These initiatives responded to the reality that the marketplace had selected Pearson Airport as eastern Canada's major "hub" facility. This airport therefore had to be developed in order to fulfil this role, which required it to compete effectively with other "hub" facilities across North America. Failure to develop would thus ultimately bring penalties extending far beyond the inconveniences, safety concerns and inefficiencies affecting existing users. It would have wide-ranging regional economic competitiveness implications.

(ii) If So, How?

An immediate issue facing the government, once the need for terminal redevelopment at Pearson had been recognized, was how to finance it. As of 1990, Transport Canada was under severe budgetary pressure, as a result of broader government deficit-reduction initiatives. According to its present Deputy Minister, a number of essential projects had already been deferred or downsized. Furthermore, as has been seen, the Auditor General was at this time reaching negative conclusions about the Department's lack of a comprehensive plan for funding infrastructural development at airports. There was nothing to insulate airport development from the fiscal constraints applying more broadly to the Department and the government.

As has been seen, the innovative airports management policy framework developed during the late 1980s provided a possible solution to the Pearson dilemma: the enhanced private sector involvement in traditional and non-traditional roles that policy specifically called for. Furthermore, Pearson Airport was already the site of a directly relevant test-case:

64 See *Proceedings*, 20:8.

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the arrangement under which Terminal 3 was being constructed by a private sector firm. Given this conjunction of policy direction and precedent, the possibility of an arrangement with the private sector for redevelopment of Terminals 1 and 2 naturally arose.

In addition to being the obvious solution to the government's financial dilemma, the involvement of the private sector addressed a second difficult question: how much immediate redevelopment was actually needed. A private sector consortium, developing the terminals under the discipline of market forces, was by definition the ideal mechanism to ensure the enhanced market responsiveness sought in the 1987 policy. In the case of the Pearson terminals, a private sector consortium could be relied upon to provide redevelopment, as and when it was genuinely needed by airport users and could be supported by the revenues generated by passenger volume. The nature and scope of development would be determined by the marketplace, rather than planners in Ottawa.

The market-responsive alternative to direct private sector involvement was the establishment of a local airport authority, as contemplated in the 1987 policy. As has been seen, however, in 1990 this alternative remained entirely hypothetical since the formation of such an authority was at an extremely preliminary stage. It is important to recognize, as well, that in 1990 the Minister needed only to decide whether to announce an intention to proceed with redevelopment by the private sector. This announcement did not preclude involvement by a local airport authority, should one have emerged at a later date.

The demand for terminal redevelopment, as expressed to the Minister by an extensive range of airport users and beneficiaries, was urgent. We believe it would have been irresponsible to refrain from action, on the grounds that there were signs of an emerging interest in forming an airport authority among Toronto municipalities.

Indeed, a refusal to act in 1990 would have left the Minister open to accusations, in our view fully justified, that policy predilections originating in Ottawa were being allowed to displace the expressed needs of the Toronto region as the basis of government decision-making. Deliberate inaction in 1990 would furthermore have gone directly against the spirit of the 1987 policy, which aimed to release airports from thraldom to centralized government management and let them respond directly to local needs and the requirements of the travelling public.

“I must say, sir, that I have watched over a number of years a lot of lobbyists get paid a lot of money and their actual influence on the way projects are developed, negotiated or decided upon is zip.”

Glen Shortliffe
Former Clerk of the Privy Council

After the Cabinet decision to request proposals from developers for the redevelopment of Terminals 1 and 2, the onus reverted to Department of Transport officials. Their job was to proceed with the development of the Request For Proposals document which would detail the government's requirements and guide developers in preparing their final proposals.

In performing this task, departmental officials coordinated the work of technical specialists from both the Department of Transport and other departments, relying on consultants for much of the detailed work. They also sought guidance from the Minister when policy issues arose, and consulted the developers and other stakeholders in order to ensure that the eventual requirements would meet with a positive response⁶⁵.

1. Standard Practices

The process of developing the Request For Proposals was subject to a number of general governmental guidelines. According to Mr. Al Clayton, Executive Director of the Bureau of Real Property Management at Treasury Board, any project involving the long-term leasing of federal lands and buildings would fall within general Treasury Board policy principles and would, as well, be subject to more specific departmental policies and procedures⁶⁶.

Mr. Clayton pointed out that private-public sector joint partnerships are by no means a recent development. On the contrary, they have played a major role in developing the country. Examples cited were the Hudson's Bay Company and the companies that built the railways. Such partnerships remain in widespread use and have become more popular in

65 See *Proceedings*, 3:43.

66 See *Proceedings*, 3:5,7.

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recent years, both in Canada and elsewhere, as governments redefine their roles in the face of diminished resources⁶⁷.

Since 1992, tendering for long-term leases of federal lands has come under a general policy framework established by the Treasury Board under the legislative mandate of the *Federal Real Property Act, 1992*. When reviewing arrangements proposed by departments, Treasury Board looks for adherence to four principles: (1) a fair return to the Crown based on the market value of the leased property; (2) a fair and equitable opportunity for private sector firms to bid, including a reasonable time to develop offers; (3) government acceptance of the highest offer or "best value," on the basis of an already established evaluation process that may involve criteria other than highest dollar value; and (4) that the lease terms be as short as possible consistent with the need to obtain financing of the lease⁶⁸.

Mr. Clayton told us of attempts to add specific content to some of the policy principles developed by Treasury Board. It was found, however, that limited use of land leasing in North American real estate markets made it difficult to specify an appropriate term for leases of federal lands. We were advised that the National Capital Commission relies on an industry standard that is twice the length of a normal mortgage, plus a few years. The security provided by a lease of this length makes lenders willing to provide financing at favourable rates, which in turn enables a private developer to maximize returns to the government. For a project such as redeveloping an airport terminal, according to Mr. Clayton, a lease in the sixty- to seventy-year range would be considered appropriate⁶⁹.

One standard clause, with respect to long-term lease agreements was the provision that the government cannot unreasonably withhold the transfer of ownership and equity between private sector parties. Such a clause preserves a requirement that government must approve an ownership change, while recognizing that changes of ownership cannot be precluded, given the length of the lease⁷⁰.

In administering a process establishing a lease of federal lands, a department must report to Treasury Board and receive approval, at specified junctures, from the ministers who comprise the Board. At a minimum, submissions must be made before the issue of the Request For Proposals, following the selection of a winning bid or proposal, and following the development of a detailed agreement. Furthermore, Treasury Board may at its discretion establish additional requirements depending on the nature of an individual project⁷¹.

67 See *Proceedings*, 3:5,6.

68 See *Proceedings*, 3:6.

69 See *Proceedings*, 3:10.

70 See *Proceedings*, 3:31.

71 See *Proceedings*, 3:7.

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In order to obtain Preliminary Project Approval, which would be required before the issue of a Request For Proposals, a justification of both the project itself and decisions about alternative mechanisms must be provided. At this stage, for example, consideration would be given to the relative merits of tendering, which sets out detailed requirements to be met by bidders, and the use of a request for proposals, which sets out objectives and encourages bidders to develop creative solutions. The evaluation process is also discussed at this time.

In order to ensure that Treasury Board concerns are addressed in advance of Treasury Board submission points, and to identify and address any implications that a major Crown project may have for other departments, there is a considerable amount of interaction between the department responsible for the project and other departments during the development of such projects.

In addition to the bilateral contacts involved with Treasury Board scrutiny, an interdepartmental committee is normally established to facilitate this broader interaction and examination. In the case under review, an interdepartmental committee was established with a core membership of Treasury Board, Finance and Privy Council Office officials. According to Mrs. Labelle, Deputy Minister at this time, as would be expected for a project of the size and ground-breaking character of the T1T2 redevelopment, outside departments were quite heavily involved.⁷².

2. Inside the Department

According to John Desmarais, who reported to Mr. Gerald Berigan, the Ottawa Director General in charge of the development of the RFP, a small steering committee was assembled in the summer of 1990, in anticipation of the Minister's announcement that proposals would be requested from private sector developers⁷³. Under the chairmanship of ADM Victor Barbeau, the committee consisted of officials at Pearson Airport who would do much of the detailed work, the Major Crown Projects general manager (also Toronto-based), and Ottawa officials who were to provide departmental support and policy direction.

Initial tasks of the steering committee were to develop required approval documents, to identify policy and process issues that would require attention in the early stages, and to conduct required studies⁷⁴. As well, a small working group reviewed the Terminal 3 experience and developed an overall work plan⁷⁵.

72 See *Proceedings*, 8:12.

73 See *Proceedings*, 11:87.

74 See *Proceedings*, 11:88 and 6:7.

75 See *Proceedings*, 6:26.

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Deputy-Minister Huguette Labelle, as well as officials more immediately involved, told us that work on the Request For Proposals did not proceed at an urgent pace during the fall of 1990 and early months of 1991 because the terminal development was initially supposed to proceed in step with other developments at Pearson⁷⁶. In the fall of 1990, Cabinet had decided to go ahead with the required environmental assessment of a proposal to expand the runways and obtain clearance for this expansion before moving on terminal redevelopment.

As well as preparing draft RFP documents and related studies, the project team engaged the firm of Price Waterhouse in February 1991, to serve as the overview consultant for the entire RFP preparation process and to prepare initial drafts of the RFP itself⁷⁷. As well, at approximately the same time, the firm of Coopers, Lybrand was retained by the Minister to ensure the probity of the proposal call process⁷⁸.

Also during this period, technical information was assembled for use by proponents in proposal preparation. This included engineering drawings, engineering reports, a complete catalogue of leases and contracts that would have to be signed, and the identification of groups of Transport Canada employees who would be transferred. In cases where policy questions remained, alternative draft documents were prepared so that the project team would be ready to respond expeditiously to political direction. For example, in May 1991 a draft Expressions of Interest document was prepared, proving that the decision to proceed with a single-stage process involving only a call for proposals had yet to be made.

Initially, it had been expected that the environmental assessment results would be available in a matter of months, but this process soon proved to be, in the words of Mrs. Labelle, "a movable feast in that the dates changed a number of times"⁷⁹. The assessment was delayed by unforeseen information needs, by a decision not to postpone public hearings until after the summer months, and by municipal elections⁸⁰.

Responding to the unexpected delay in the environmental assessment process, in the summer of 1991 Minister of Transport Jean Corbeil obtained Cabinet agreement to detach terminal redevelopment from initiatives relating to runway development, and proceed on them separately. Mr. Corbeil reported that this reflected the fact that the objective of the project was not the expansion of the terminals but their redevelopment and modernization

76 See *Proceedings*, 8:20.

77 See *Proceedings*, 6:3.

78 See *Proceedings*, 16:47.

79 See *Proceedings*, 8:20.

80 See *Proceedings*, 8:24.

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and, as such, was substantially unrelated to the issue of runway development⁸¹. The Deputy Minister at this time, Mrs. Labelle, added that an options was included in the Request For Proposals to protect the government in the event that a negative assessment by the environmental panel prevented runway development from proceeding.

As the Request For Proposals took shape, policy issues were identified and referred for the Minister's consideration. These issues were outlined for us by Mr. Berigan⁸². They included the scope of the operational mandate to be given to the successful developer; the implications of expanded runway capacity for the amount of investment that would ultimately be required; employee transfer issues; the question of whether the Terminal 3 developer and/or foreign controlled proponents should be eligible; and the factors to be used in evaluating the proposals. As already discussed, the timing of the terminal redevelopment initiatives in relation to the environmental assessment process was addressed after the 1990 announcement.

According to our testimony, representations were received from the developers during the Request For Proposals development period about what should be done, how it should be done, and when it should be done (for details, see the discussion of developers and their lobbyists below).⁸³ Comments provided by the Minister and officials concerning these representations made it abundantly clear, however, that they were recognized for what they were: attempts by the developers to ensure that public interest arguments which would also work to their corporate advantage were fully heard by the Government. The Minister and officials made use of these representations as a source of information and possible options, but affirmed their awareness that it remained the responsibility of public officials, and theirs alone, to determine how the public interest could be served by the requirements of the Request For Proposals. Thus, for example, Mrs. Huguette Labelle advised us that as Deputy Minister of Transport during this period:

I took their phone calls, received them, listened to them...and at the end, they did not have an influence on how - the quality of my advice or how I would advise my ministers, whoever the minister may be.⁸⁴

Minister Corbeil advised us that, in general, he worked with his immediate colleagues, Minister of State for Transport Shirley Martin, Deputy Minister Huguette Labelle and other Transport Canada officials, on a collegial basis to identify the options relating to policy issues for the Request For Proposals as they emerged, and develop positions based on

81 See *Proceedings*, 21:17-18.

82 See *Proceedings*, 6:27.

83 See *Proceedings*, 3:93 and 6:26.

84 See *Proceedings*, 8:65.

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a meeting of minds⁸⁵. He did not specifically relate his close reliance on input from officials to the technical nature of many of the policy issues raised, but the issues specified above suggest this explanation. In addition to his general account of decision-making during the development of the Request For Proposals, Mr. Corbeil also made specific comments on several issues.

A) Structure of Proposal-Seeking Process

An early issue was whether the two-stage process adopted for Terminal 3 should be followed, in which case a call for Expressions of Interest by developers would have identified a field of competitors from which a select group could be invited to respond to a detailed Request For Proposals. The main alternative (assuming a competitive process) was a single stage process, in which developers would respond only to a detailed Request For Proposals.

The Minister believed that it was unnecessary in this case to test the waters to see if developers were interested. This had been amply demonstrated by the unsolicited proposals received by the Department, several of which predated Minister Lewis' October 1990 announcement and indicated that the significance of Terminal 3 as a positive signal had not been lost on developers⁸⁶.

Officials agreed with this assessment. According to Mr. Power, who worked on both the Terminal 3 and the Terminals 1 and 2 projects, Expressions of Interest are used (as was the case in Terminal 3) when officials are not certain of the extent of private sector interest and must decide whether private sector participation should be sought⁸⁷. There was, however, no basis for declaring one system to be more "normal" than the other with respect to the T1T2 process⁸⁸. According to the Deputy Minister at the time, it was desirable to avoid the additional expense of a two-stage process, unless circumstances specifically warranted⁸⁹.

85 See *Proceedings*, 21:7 and 21:20.

86 See *Proceedings*, 21:15-16.

87 See *Proceedings*, 6:10 and 8:23.

88 See *Proceedings*, 3:96.

89 See *Proceedings*, 8:23.

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B) Scope of Development

Early consideration was given to whether the Request for Proposals should invite development only of Terminal 1, only of Terminal 2, or development of both. The boundaries of the property to be offered for lease also had to be decided, as had the extent to which the centre core property of the airport should be included.

According to Minister Corbeil, he and his officials recognized that focused modernization of Terminal 2 had supporters, including the unions, Air Canada and the owners of Terminal 3 (Claridge). The Minister was concerned, however, that the instantaneous loss of twenty-four gates that would accompany the closing of Terminal 1 might impede the functionality of the entire airport. Thus, the Request For Proposals required Terminal 1 to remain open in the short term, but invited proponents who had innovative solutions that would permit the closing of Terminal 1 to submit them.⁹⁰

C) Bid Submission Period

The stipulation of a bid submission deadline of 19 June 1992, 93 days after the 19 March release of the information package for proponents, also reflected direction from the Minister of the day, the Hon. Jean Corbeil. He believed that such a period was normal for projects of this kind and noted that Canadian Airports, in its unsolicited proposal, had expressed readiness to comply with a 60-day submission period⁹¹. In order to ensure that the designated period would exclude no one, it was made clear to the public and interested proponents that requests for extension of the deadline would be considered⁹². Commenting on the ninety-day decision, Mr. Berigan mentioned in addition, the awareness within the government that the initiative had been public knowledge since the original announcement in October 1990, and that serious proponents were already at work on their proposals⁹³.

There appears to have been a perception among certain departmental officials that Price Waterhouse, consultant for the overall development of the RFP, had concerns about the ninety-day submission period. For example, a departmental memorandum claims that the firm took the view that a ninety-day response time could create an impression that the government "is not committed to a fully open and competitive process."⁹⁴

90 See *Proceedings*, 21:18.

91 See *Proceedings*, 21:34-35.

92 See *Proceedings*, 21:18.

93 See *Proceedings*, 6:9.

94 See *Proceedings*, 6:33.

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We were, however, advised by Mr. John Simke, who led the Price Waterhouse team during the development of the Request For Proposals, that Price Waterhouse advised departmental officials that 90 days was at the short end of the range of acceptable bid submission periods, given the size and complexity of the project. Mr. Simke indicated, further, that the selection of a proposal submission deadline is very much a judgement call, and that there is no standard basis for recommending, for example, 60 days over 90 or 120, or 120 over 60 or 90.⁹⁵

Officials themselves were cautious about expressing opinions on a matter that reflected political direction. Mr. Ran Quail, who was to lead negotiations with the successful proponent for several weeks preceding his appointment as Deputy Minister, Public Works and Government Services, did however agree that a ninety-day time-frame was "tight"⁹⁶.

D) Evaluation Criteria

The evaluation criteria were developed somewhat separately from other elements of the Request For Proposals. Mr. Victor Barbeau told us that Mr. Ron Lane, then regional director of airports in Atlantic Canada, was selected to head the committee dedicated to the evaluation process specifically because of his detachment from the Pearson Airport file⁹⁷. Mr. Lane described his basic functions, leading up to the issuing of the Request For Proposals, as being to establish the evaluation methodology, establish an evaluation committee, develop the evaluation criteria, and prepare the evaluation documentation⁹⁸.

After undertaking the assignment in January of 1992, an early task of Mr. Lane and his group was drafting Chapter 7 of the RFP, the section informing proponents how the evaluation would be carried out and according to what criteria. According to Mr. Berigan, a consultative process was first established to review the Terminal 3 experience and to have general headings scrutinized in interdepartmental consultations or by Price Waterhouse⁹⁹. The numerical indicators of the respective weights of the various evaluation criteria are not set out in the RFP. Instead, criteria are grouped into three classes: those of "primary importance," those of "marginally less but substantial importance," and those of "lesser but significant importance"¹⁰⁰. We understand that the criteria and their numerical weighting

95 See *Proceedings*, 15:9.

96 See *Proceedings*, 15:65.

97 See *Proceedings*, 2:45.

98 See *Proceedings*, 6:48.

99 See *Proceedings*, 6:35.

100 *Request For Proposals*, p. 48.

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were defined in detail during the interval between the issue of the RFP and the bid submission deadline¹⁰¹.

As noted above, the Minister participated with officials in establishing the factors to be used in assessing the proposals. As well, according to Mr. Lane, ministerial approval for the composition of the evaluation committee was sought and received, at the Request For Proposals drafting stage. At a later stage, the complete evaluation documentation, including weightings for the various criteria, was supplied for ministerial review. However, the Minister made no changes. Indeed no intervention by the Minister occurred at this juncture¹⁰², or at any other time.

E) The Document Room

As the Request For Proposals was developed, officials also proceeded with the assembly of reference documents to be made available to proponents. In the course of this exercise, a puzzling decision was made that was to have serious consequences at a later stage of the process, when the details of the Pearson agreements were being negotiated. During negotiations, it would be realized that what was not in the room, rather than what had been put into it, was the central significance of the document room.¹⁰³

Officials decided not to include a 1989 document entitled "Guiding Principles For Air Canada Lease Negotiations, Terminal II" between the Department (signed by Glen Shortliffe, Deputy Minister at that time) and Air Canada. The document provided that, when the existing lease of Terminal 2 expired in 1997, it would be replaced with a twenty-year lease, renewable for two additional ten-year periods. It also contained a series of other provisions, including a basis for determining Air Canada's rental rates and the portability of the arrangement if Transport Canada were to sell or assign Terminal 2.

According to Mr. Berigan, departmental officials believed that Air Canada's support for the Paxport unsolicited proposal reflected an abandonment of its adherence to the "guiding principles". They claimed that in their consultations over the contents of the Request For Proposals, Air Canada had not suggested including the guiding principles. Instead, Air Canada ratified what would become the language of the Request For Proposals, which requires proponents to recognize both Air Canada investments in the terminal (and to provide for appropriate compensation) and the fact that Air Canada had a lease extending to 1997. Officials thus proceeded on the basis that the "guiding principles" document had

101 See *Proceedings*, 6:58.

102 See *Proceedings*, 6:52.

103 See *Chapter V*.

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no legal status, even though they acknowledged awareness of a 1991 letter to Mrs. Labelle, Deputy Minister, reiterating Air Canada's adherence to the 1989 arrangement ¹⁰⁴.

3. Outside the Department

During development of the Request For Proposals, the development team and those who directed it talked to various parties with an interest in Pearson, sometimes at the initiative of officials and sometimes in response to requests.

A) Local Airport Authorities

The government's intention to seek developers' proposals for refurbishing Terminals 1 and 2 provoked predictable criticism from those attempting to establish a Toronto Local Airport Authority. At a December 1990 meeting with the Minister, representatives of the five regional councils involved in that attempt reiterated their earlier written request for the federal government to slow down to allow a local airport authority to be put in place. Minister Lewis responded that terminal redevelopment was a top priority and could not be delayed. According to Mr. Gary Harrema, who, as Chair of the Durham Regional Council, was present at the meeting, the Minister stated that he had heard that municipal councils were not in agreement, and that agreement would need to be confirmed through resolutions duly passed by all of them¹⁰⁵.

Local officials wishing to develop an airport authority for Pearson had differing impressions of the Minister's position, however. Mr. Gardner Church, Ontario's Deputy Minister for the Greater Toronto area, believed that the December 1990 meeting made it clear that the federal government would not recognize a Toronto local airport authority before Terminals 1 and 2 had been leased to developers. On the other hand, Mr. Gerry Meizner, former President of the Metropolitan Toronto Board of Trade, believed that Minister Lewis had stated that he himself would be first in line to recognize a local airport authority, as soon as it had the support of the regional and local municipalities¹⁰⁶.

Minister Lewis' recollection of his 7 December 1990 meeting with representatives of the Greater Toronto Area, supported by references to departmental memoranda summarizing those proceedings, was that it was made absolutely clear that the door to recognition of a local airport authority remained open. According to the memoranda, a local airport authority was not ruled out and the Minister indicated his willingness to examine proposals, while at the same time affirming his determination not to delay release of a

104 See *Proceedings*, 6:44.

105 See *Proceedings*, 5:15-16-17.

106 See *Proceedings*, 5:39.

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Request For Proposals. As well, GTA representatives were asked for input to the process of developing the Request For Proposals¹⁰⁷.

We have seen no evidence of substantive input. Indeed, Mr. Church told us that there was very little communication in response to Minister Lewis's invitation for input. According to Mr. Church the next communication to the local organizing committee was a year and a half later in the form of "a brown envelope advisory from a disgruntled employee in Transport Canada that a call for proposals was about to hit the street"¹⁰⁸.

News of the government's intention to call for proposals seems to have provoked a flurry of activity at the regional level. Representatives of the Greater Toronto Area convened a meeting in February 1992 at which, according to Minister Corbeil, they conveyed the impression that they had only recently become aware of the federal local airport authority policy and demanded the indefinite postponement of the terminal redevelopment project. At this meeting, federal representatives were informed of a provincial government attempt to sponsor the formation of a local airport authority, an initiative that departed substantially from the basic principles of federal policy in that, for example, such an authority would be not a private group, but a means whereby the Government of Ontario could gain access to airport revenues¹⁰⁹.

According to GTA officials, the meeting did not resolve any of their major differences with the federal government. One of the federal ministers present, the Hon. Michael Wilson, did, however, say that if the airport authority could get its act together a bid from it would be welcome¹¹⁰. GTA representatives concluded that the inclusion of local political representation within a local airport authority was seen as an insuperable problem by the federal government. This was the major issue on which they perceived a disagreement with federal requirements¹¹¹. They also told us that they disagreed with the federal perception that action was urgently needed, given that the recession was now well underway and demand on the airport facilities was declining.

The meeting appears to have led the Ontario government to decide to underwrite, if necessary, a proposal for the redevelopment of the terminals, and to heighten its efforts towards the formation of a local airport authority. GTA officials described this move as creating "a great deal of excitement between the federal government and the province".¹¹²

107 See *Proceedings*, 4:16.

108 See *Proceedings*, 5:17.

109 See *Proceedings*, 21:53-54.

110 See *Proceedings*, 5:24.

111 See *Proceedings*, 5:21.

112 See *Proceedings*, 5:24.

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According to Mr. Church and local politicians, the federal decision to proceed with a Request For Proposals also caused the emerging consensus among municipalities to disintegrate, and resulted in at least two competing prospective authorities. Indeed, according to Mr. Church, the federal government was attempting at this time to ensure that there was no cohesive Toronto position. However, no indication was provided of how this was being done¹¹³.

According to these officials, at this time the City of Mississauga broke ranks with the Greater Toronto Area Heads of Council Committee which had been promoting the formation of a local airport authority, and began to champion private sector involvement in advance of the formation of any such authority¹¹⁴. Mississauga's mayor, Hazel McCallion, suggests a somewhat different position. Mayor McCallion claims that her priority at the February 1992 meeting was to avoid any delay in renovating the two terminals, especially Terminal 1, which was in need of immediate repair¹¹⁵. Her testimony also suggested that she had opposed the 1992 local authority initiative from the start:

After it was announced that the government was proceeding with a proposal call on Terminals 1 and 2, the province became very interested in the airport. And so did the past President of the Metro Board of Trade, Mr. Bandeen, and proceeded again without any consultation with the City of Mississauga to set up what I called an illegal airport authority made up of Mr. Bandeen, Mr. Meizner, and members of the Metro Board of Trade¹¹⁶.

Right up to the issue of the Request For Proposals, the federal view continued to be that no organization in Toronto met the requirements for recognition as a local airport authority, from which input could appropriately be sought¹¹⁷. The central issue about which municipalities disagreed, according to Minister Corbeil and federal officials, was Mississauga's insistence that the Toronto Island Airport be included within the jurisdiction of a Local Airport Authority. **The major concern about an attempt to transfer more than one airport at a time was explained to us by Mr. Michael Farquhar, then head of Transport Canada's Airports Transfer Task Force. Such an attempt could have resulted in the successful transfer of Toronto Island Airport but failed with respect to Pearson. This would have created what was seen as a ludicrous situation: a local airport authority whose essential purpose was to manage Pearson, but which would be**

113 See *Proceedings*, 5:14 and 15:18.

114 See *Proceedings*, 5:24.

115 See *Proceedings*, 20:8.

116 See *Proceedings*, 20:7.

117 See *Proceedings*, 21:54 and 8:27.

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able to manage only Toronto Island.¹¹⁸ Mississauga's position also raised practical problems because Toronto Island airport was not fully owned by the federal government but functioned under the tripartite ownership of the federal government, the City of Toronto (which opposed its transfer) and the Toronto Harbour Commission¹¹⁹.

Federal officials' assertions that local officials within the Toronto region significantly disagreed over the establishment of a local airport authority are supported by the mayor of Mississauga's characterization of the 1992 local airport authority initiative and her testimony concerning her position on the inclusion of Toronto Island Airport. According to Mayor McCallion, Mississauga's support for a local airport authority remained conditional on the inclusion of Toronto Island Airport until 1994, and was only changed because it was clear that the City of Toronto was not going to agree¹²⁰.

B) Air Canada

During the Request For Proposals development period, Air Canada had important direct involvements with both Transport Canada and developers. In addition, its influence within the Air Transport Association of Canada was apparent in the latter's interventions in the Pearson terminal redevelopment issue.

As the RFP development process unfolded, Air Canada's position on the need for terminal redevelopment and its appropriate scope underwent some noteworthy changes. According to Mr. Dominic Fiore, Senior Director, Corporate Real Estate, Air Canada during the Pearson process, in 1990 the recession hit the airline business "like a tidal wave"¹²¹. Air Canada responded with a general program of cost-cutting and downsizing, which included the postponement of phase 2 of its Terminal 2 refurbishment program until company finances improved, and a reduction in the scope of plans.

The October 1990 announcement that a call would be issued for proposals from private sector developers for the redevelopment of Terminals 1 and 2 came, according to Mr. Fiore, in the early stages of Air Canada's downsizing. In response to the government's request for input, Air Canada, in March of 1991, wrote affirming its willingness to provide information and listing a series of requirements to be incorporated in the Request For Proposals. The letter continued, however: "we are not convinced that the transfer of the

118 See *Proceedings*, 5:71.

119 See *Proceedings*, 20:9.

120 See *Proceedings*, 20:15.

121 See *Proceedings*, 12:76.

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terminal to a third party developer-manager is the only or most suitable vehicle to address its future"¹²².

Also in March 1991, Air Canada was advised by Transport Canada that a competitive bidding process required the company to terminate the relationship with Paxport that had involved Air Canada's support for Paxport's unsolicited proposal in the previous year. In April 1991, Air Canada, in turn, advised Paxport of its withdrawal from their joint initiative to redevelop Terminal 2, and that all developers would be dealt with equally and at arms' length for the period of the competitive process¹²³.

Questioned about a Paxport memorandum indicating an Air Canada official had agreed to continue informal contacts, Air Canada witnesses affirmed that Paxport had had no privileged relationship with the airline after April 1991¹²⁴. This view was echoed by Raymond Hession, President of Paxport during this period, who advised us that thereafter Air Canada had dealt with Paxport strictly on an arm's length basis¹²⁵.

This position was confirmed in responses to questions about an internal Paxport document, on a 12 July 1991 meeting, at which Air Canada officials directly responsible for airport development had stated their preference for Paxport, should there be private sector development, and that Air Canada would not be dealing with other developers¹²⁶. The Air Canada representatives who appeared before us were not present at the 12 July meeting, and were unable to explain what their colleagues at that time had intended¹²⁷. Mr. Fiore stated that he did not communicate any preference for Paxport in his dealings with the company.

Later in 1991, Air Canada gave Transport Canada its moderated phase 2 plan for Terminal 2 (its major input to the development of the Request For Proposals) along with supportive documentation for inclusion in the document room. This material included a statement of the principles for leases which, according to Air Canada representatives, reflected the 1989 Guiding Principles¹²⁸. It included references to the rental rate agreement, protection of Air Canada's equity in Terminal 2, scope of development, and control over operational areas¹²⁹.

122 Pierre Jeanniot to Doug Lewis, July 1990, Committee document LA 000484.

123 See *Proceedings*, 12:91.

124 See *Proceedings*, 12:92.

125 See *Proceedings*, 9:29.

126 See *Proceedings*, 9:33.

127 See *Proceedings*, 12:95.

128 See *Proceedings*, 12:101.

129 See *Proceedings*, 12:100.

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C) The Air Transport Association of Canada

An exaggerated form of Air Canada's response to the government's stated intention to seek private sector proposals for Terminals 1 and 2 came from the Air Transport Association of Canada, the industry association of commercial aviation operators. This association, according to Mr. Gordon Sinclair (its President during this period), represents a membership accounting for about 95% of commercial aviation revenues in Canada¹³⁰.

According to Mr. Sinclair, a 6 September 1991 letter to Minister Corbeil expressed a substantial consensus among association members that the redevelopment of Terminals 1 and 2 did not respond to any demand from the airline industry. The letter argues that it would be foolish to seek proposals to redesign and renovate a terminal that Air Canada had just refurbished and goes on to argue that the recession was likely to create a five-year pause in passenger volume at the airport, making major expansion unjustified. Moreover, the pace and scope of development should be determined by the anchor tenant. The letter argues, furthermore, that development and expansion of terminals by private sector operators is not in the interest either of airlines or consumers, who would have to absorb the costs¹³¹.

A resolution expressing substantially the same sentiments was passed by the Association on 12 November 1991 and subsequently communicated to the Minister of Transport. Finally, on 5 March 1992, Mr. Sinclair sent a second, equally emphatic letter to the Minister, on behalf of the association. It argued that monopoly control over airport terminals by a private sector operator would inflict major injustice upon the travelling public¹³².

According to Mr. Sinclair, the letters were acknowledged but no substantive response arrived from the Minister of Transport until May of 1992, after the Request For Proposals had been released. The response confirmed the Minister's belief that terminal planning and development was warranted by passenger growth forecasts and should go ahead at that time¹³³.

D) The Developers and Their Lobbyists

During the development period for the Request For Proposals, the consortiums intending to submit proposals competed with one another to recruit support from third parties believed to have potential influence, and to obtain an information edge with respect to the plans and requirements of the government. They also sought to persuade politicians and

130 See *Proceedings*, 13:75.

131 See *Proceedings*, 13:76.

132 See *Proceedings*, 13:79.

133 See *Proceedings*, 13:82.

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elected officials of the merits of bidding process characteristics and proposal requirements that they believed would operate to their advantage (or, conversely, to the disadvantage of rival consortiums).

(i) Canadian Airports

The Canadian Airports consortium was made up of British Airports Authority PLC in collaboration with the Toronto-Dominion Bank, Cogan Corporation, Ellis-Don Ltd., J.J. Barnicke, and the Public Service Pension Board. Its purpose was essentially to facilitate the application of British airport development expertise in Canada and the United States. Since this consortium dropped out of the process before the Request For Proposals was issued, we did not meet its representatives.

In order to ensure we had full knowledge of any lobbying in relation to the Pearson agreements, we did, however, invite Mr. Fred Doucet to appear before us. During the proposal development period, Mr. Doucet, as President of the lobbying firm Fred Doucet Consulting International, had acted for the Canadian Airports consortium, having initially been retained by Mr. Edwin Cogan, an international developer, in March 1990.

According to Mr. Doucet, his firm remained registered as the government relations consultant for Canadian Airports in December 1992, when the government announced its selection of a best overall acceptable proposal. The firm's services consisted of monitoring developments within the government and providing advice and counsel relating to the consortium objective of competing for the T1T2 terminal redevelopment contract¹³⁴. The major activity took place before December 1991, at which time the consortium suspended its operations in Canada, with a public statement to the effect that the slow pace of the Request For Proposal process had led it to doubt whether it would actually be issued¹³⁵.

We were interested to learn, as well, that on 1 February 1993 Paxport would sign two contracts, to become effective when the Terminals 1 and 2 agreements were concluded, with Fred Doucet Consulting International. These contracts provided for government relations services relating to the devolution of Canadian airports elsewhere in Canada, and to work at airports outside Canada. They would have involved payments of \$8,700 and \$8,000 per month respectively, over a ten-year term (50% of this revenue would have gone to a firm sub-contracted by Mr. Doucet).

134 See *Proceedings*, 16:55.

135 See *Proceedings*, 16:56.

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Airport Terminals Development Group (Claridge)

(i) The Consortium

The Airport Terminals Development Group (ATDG or Claridge) consortium was a joint venture between Claridge Properties and LAH, a subsidiary of Lockheed dedicated to the management of airports. It had grown out of the consortium that was the principal owner of Terminal 3, in which Claridge Properties had by stages replaced the firm of Huang and Danczkay, the original developers of Terminal 3, replacing them fully in April of 1992¹³⁶.

Mr. Coughlin, President, Claridge Properties Ltd., told us that Claridge had originally bought a share in Terminal 3 only because of the government's announced intention of privatizing Terminals 1 and 2, thus creating the possibility that Claridge could eventually be involved in operating all three terminals. This was, and remained, the company's ultimate objective.

During 1991, however, Claridge's immediate focus was on persuading the government to close Terminal 1 and move its traffic to Terminal 3. This would have solidified the traffic volume through that terminal and provided an important benefit to Canadian Airlines, whose rental payments would have fallen with the broadening of the tenant base¹³⁷. Mr. Coughlin acknowledged, however, that "the government took a much longer term perspective," focusing on the need for Pearson to be developed. He further volunteered the view that, given the needs of Air Canada, "they were probably right"¹³⁸.

Mr. Coughlin also told us that during this period Claridge was fully aware of the government's intention to issue a Request For Proposals: "we certainly had knowledge that it was coming, and we were certainly prepared"¹³⁹.

Even though the Claridge proposal was ultimately not selected by the government, Mr. Coughlin expressed general approval of the requirements established by the Request For Proposals. He considered that a two-stage proposal process, as had been employed with respect to Terminal 3, was not needed and that the 90-day proposal preparation period was reasonable, given the possibility of an extension¹⁴⁰. He also applauded the fact that the

136 See *Proceedings*, 15:81.

137 See *Proceedings*, 12:71.

138 See *Proceedings*, 17:95.

139 See *Proceedings*, 17:72.

140 See *Proceedings*, 17:74.

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Request For Proposals had called for creativity and innovative solutions from the developers, rather than prescribing in detail what should be done.

(ii) Its Lobbyists

Mr. Harry Near, Earnscliffe Strategy Group, told us that when Claridge replaced Huang and Danczkay, for which Earnscliffe had worked since May 1989, it had retained his firm on a monthly retainer of \$5,000 for government relations work (a second contract, at \$4,000 per month, dealt with communications advice)¹⁴¹.

The principal services provided during the Request For Proposals development period, according to Mr. Near, were the monitoring of developments within the government and the provision of advice on the shape of the emerging Request For Proposals and the process to be in place upon its release. Most of this activity took place in the spring of 1992¹⁴².

Once it became clear that there would be a competitive process involving the issue of a Request For Proposals, the monitoring activity was expanded to include an effort to convince the government that proponents should be evaluated on the basis of their financial capacity to redevelop and operate the terminals, as well as on operational criteria¹⁴³.

We were, as well, advised by Mr. Near that there had been an intensely competitive relationship between Claridge and Paxport, right up to the announcement of a best overall acceptable proposal: "Figuratively, we were trying to kill each other"¹⁴⁴.

We also heard from a second firm retained by Claridge, the Capital Hill Group. Mr. Herb Metcalfe, a senior partner, advised us that his group had commenced work on the Pearson Airport file in August of 1991, on a monthly retainer of \$10,000¹⁴⁵. This arrangement had continued up to the time of our hearings.

Mr. Metcalfe indicated that, during the time of the RFP development, his firm undertook to monitor developments within the government in order to identify key concerns and issues that would assist Claridge in shaping its proposal¹⁴⁶. As well, during the early

141 See *Proceedings*, 15:85.

142 See *Proceedings*, 15:82.

143 See *Proceedings*, 15:82.

144 See *Proceedings*, 15:100.

145 See *Proceedings*, 15:116.

146 See *Proceedings*, 15:121.

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phase of the Request For Proposals development period, an unsolicited proposal was submitted to the government and Capital Group provided assistance as "we shopped that proposal around town." It attempted to persuade the government to mothball Terminal 1 and transfer the traffic to Terminal 3.¹⁴⁷.

Paxport

A) The Consortium

By the time the Request For Proposals was released, the Paxport consortium had evolved considerably from the 1989 joint venture between the Matthews Group and Bramalea Inc. It now comprised eight firms: Matthews Group Ltd. with 35% ownership, along with Allders International, CIBC Wood Gundy Capital Inc., Ellis-Don Inc., Bracknell Corp., Agra Industries Ltd., NORR Partnership Ltd., and Sunquest Vacations Ltd.

During the development of the Request For Proposals, Paxport President Raymond Hession made a number of representations to government officials on issues relating to both the RFP process and the substance of the request.

An issue that received early attention was the structure of the proposal process, and the respective merits of a one-stage bidding process and the two-stage process employed for Terminal 3. Attending, on behalf of Paxport, a meeting with departmental officials on 15 April 1991, Mr. Hession advocated a one-stage process on the grounds that a call for Expressions of Interest would be unnecessary and costly, given that three potential bidders (enough for a fair competition) were already known¹⁴⁸.

At the same meeting, Mr. Hession also advocated the use of a "contract definition" approach to the proposal call; this would have involved the definition of the contract by the proponents, in close collaboration with the government. Such an approach, we were told is sometimes used by the government where a very limited source of supply for goods or services makes it advantageous for government and business to work together to create a new supply capability¹⁴⁹. In addition, a case was made for the exclusion of municipalities and prospective local airport authority candidates from the submission of proposals.

Questioned on the final form of the Request For Proposals, Mr. Hession was strongly positive about what he termed "a first-class proposal call." He commended, in particular, a

¹⁴⁷ See *Proceedings*, 15:130.

¹⁴⁸ See *Proceedings*, 8:92.

¹⁴⁹ See *Proceedings*, 8:93.

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clear statement of objectives, unambiguous evaluation criteria, clear definition of the problems, and openness to innovative solutions from the private sector¹⁵⁰.

Paxport also cultivated a relationship with Air Canada during this period. We reviewed an internal Paxport memorandum written by Mr. Hession, dated 21 March 1991, which referred to a meeting between himself and an Air Canada official and to the continuing "strong and productive" relationship between them. This was immediately prior to the Air Canada's submission of its input into the Request For Proposal development process. The relationship had ceased, however, to involve formal collaboration relating to Paxport's 1989 unsolicited proposal and would, on Air Canada's part, have reflected Air Canada's continuing interests¹⁵¹. According to a somewhat ambiguous statement by Mr. Hession, the frequency of meetings with Air Canada had begun to diminish during the summer of 1991, and Air Canada had begun to explore possibilities with competing developers¹⁵².

B) Its Lobbyists

Mr. Bill Neville advised us that he had served as the overall coordinator for lobbying on behalf of Paxport from 23 January 1990 until the end of August 1993, on a retainer of \$4,000 per month plus expenses¹⁵³. During the final months of this contract, in June 1993, he headed Ms Campbell's transition team following her assumption of the prime ministership, among other responsibilities providing advice on the governmental reorganization and the shuffle of deputy ministers that saw Mrs. Labelle transferred to the Canadian International Development Agency and Mrs. Jocelyne Bourgon become Transport's new Deputy Minister¹⁵⁴. Mr. Neville reported to us that he was also on retainer to Air Canada for advice on matters not related to the T1/T2 redevelopment project from September 1991 to August 1994¹⁵⁵.

According to Mr. Neville, during the preparation period for the Request For Proposals his initial focus was on trying to convince the government to proceed as expeditiously as possible¹⁵⁶.

Subsequently, representations were made on a number of the policy issues that arose in RFP development, including the length of the bidding time-frame. Paxport's support for

150 See *Proceedings*, 9:53-54.

151 See *Proceedings*, 9:29-30.

152 See *Proceedings*, 9:34.

153 See *Proceedings*, 16:11-12.

154 See *Proceedings*, 16:21.

155 See *Proceedings*, 16:15.

156 See *Proceedings*, 16:12.

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a ninety-day period, seen as "nothing more than the standard," reflected its belief that it had an advantage over most competitors because of having done more front-end preparatory work¹⁵⁷. A second issue, on which representations were made to Minister Corbeil, among other elected officials, was the structure of the bidding process. Paxport, as has been seen, favoured the elimination of a call for Expressions of Interest¹⁵⁸.

As well, a February 1992 memorandum from Mr. Hession to Mr. Neville sets out a broad strategy that would have applied to the late RFP development and subsequent evaluation stages. The purpose, according to Mr. Hession, was to ensure that every mayor, economic development commissioner, and regional chairman, along with members of the airport task force recently established by the Mayor of Toronto, would receive a personal briefing on Paxport's proposals¹⁵⁹.

We also heard from Mr. Andrew Pascoe, of A.D. Pascoe and Associates. He indicated that he had contracted to represent Paxport in contacts with the Ontario government, regional and municipal governments, business groups, organized labour and other local organizations during 1992 and 1993, but had had no dealings with Ottawa during this period¹⁶⁰. The primary purpose of these contacts was to create as broad a base of support as possible for the redevelopment of Terminals 1 and 2, and to ensure that the merits of the Paxport proposal were known by all parties involved in the issue.

Morrison Hershfield

A fourth developer, Morrison Hershfield, prepared a terminal redevelopment proposal during this period. As will be seen below, however, this activity did not relate to the Request for Proposals being developed at this time.

157 See *Proceedings*, 16:23.

158 See *Proceedings*, 16:31.

159 See *Proceedings*, 8:90.

160 See *Proceedings*, 16:39.

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4. The Release of the Request for Proposals

Developments in the circumstances of Pearson Airport during the preparation period for the Request For Proposals raised two major questions requiring ultimate resolution by the Minister and cabinet, as of early 1992¹⁶¹.

The resistance of Air Canada and other airlines to development that might result in increased terminal rents had been heightened considerably by the recession, and had resulted in calls for (at a minimum) the delay of significant development.

According to departmental officials, however, it was felt important to move forward on the project, given the long-term strategic plan to optimize Pearson Airport and the five to seven year time-frames involved in development¹⁶². As well, while the recession eased immediate pressures for expansion, it also generated a new need, referred to with increasing frequency in internal departmental documents from mid-1991 forward and figuring prominently in the minister's announcement of the Request For Proposals. This was the need to provide an economic stimulus to the Toronto area, and create jobs in the construction industry, which had been severely affected by the recession¹⁶³. A final consideration, stressed by Minister Corbeil during his appearance, was that additional capacity was not the primary focus of the project, although it was an element, in view of passenger forecasts¹⁶⁴. This view was echoed by officials such as Mr. Power, according to whom modernization of the existing terminals was the central focus, bearing in mind that modernization should be undertaken before the reductions in passenger capacity created by other construction resulted in overall problems of congestion¹⁶⁵.

A second issue was raised by continuing attempts to establish a Toronto Local Airport Authority: should the issue of a Request For Proposals be delayed in the expectation, or hope, that agreement might be reached between the Greater Toronto Association or an alternative and the Minister on the issue of recognition? This prompted two questions: (1) was recognition likely in the foreseeable future and, if not, (2) would the private sector redevelopment of Terminals 1 and 2 seriously limit the scope of a Local Airport Authority if and when one was eventually formed?

As has been seen, as of early 1992, Minister Corbeil and most Transport Canada officials believed that little progress had been made in resolving the disagreement between

161 See *Proceedings*, 6:27.

162 See *Proceedings*, 8:15-16; 2:44; 6:30.

163 *Memo from Transport Canada*, 1993, Committee document 1-1# 0061.

164 See *Proceedings*, 21:26.

165 See *Proceedings*, 6:37.

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Mississauga and other municipalities with respect to whether the management of the Toronto Island Airport should be part of the initial mandate of a local airport authority. There was thus little optimism about early recognition of such an authority.

Reflecting advice from more specialized levels in the department, the Deputy Minister at this time, Mrs. Labelle, believed that a local airport authority formed after the leasing of Terminals 1 and 2 to a private sector firm would retain significant responsibilities. Among those mentioned were the allocation of airlines among terminals, the management of access to transportation on the ground, decisions relating to the development of sector 4 (a parcel of land adjacent to the terminals which is available for future terminal development), the management of the remaining airport lands and possibly the resolution of runway development issues¹⁶⁶.

Minister Corbeil sought authorization from cabinet in early 1992 to proceed directly with the issue of a Request For Proposals. Documentation for this was, as has been seen, at an advanced level of development at this point, enabling its public release on 16 March 1992, some seven weeks after the green light was received from cabinet.

The fifty-page Request For Proposals document released on 16 March 1992 provided a detailed review of development objectives, considerations and requirements established by the government in some 12 areas, ranging from traffic forecasts and plans for runways to the various parts of the terminal buildings. The Request also set out the structure of management and operations that would apply, the business arrangements, and eligibility requirements. Finally, it described the structure and content that would be required in proposals, and the evaluation criteria to be applied to them, and added a series of miscellaneous requirements, such as compliance with the *Competition Act*, and supplementary information.

An appendix to the Request For Proposals detailed the steps to be taken by proponents and applicable deadlines, including the proposal submission deadline of 1500 hours, 19 June 1992. At the time of the announcement, it was indicated that requests for an extension of the deadline would be considered.

166 See *Proceedings*, 8:26.

5. Observations and Conclusions

A) Process

During our hearings on the development of the Request For Proposals, we continued the practice of systematically asking officials who had had significant responsibilities at each stage to state under oath their views on the process. In particular, we asked them to state their personal judgments on whether they had been subjected to requirements for speed that compromised their work, whether their work had been subject to interference from the political level, whether lobbyists had influenced their decisions and whether, more generally, they were satisfied that the requirements of due process had been met.

Without exception, responsible officials endorsed the process in which they had participated. In particular, the process up to the time of the release of the Request For Proposals was endorsed by the Hon. Jean Corbeil, Minister of Transport during this period¹⁶⁷; Mrs. Huguette Labelle, Deputy Minister¹⁶⁸; Victor Barbeau, Assistant Deputy Minister, Airports¹⁶⁹; Gerald Berigan, Director General responsible for the Request For Proposals development process¹⁷⁰; and Ron Lane, Chairman of the evaluation process and responsible for the development of evaluation criteria¹⁷¹.

Similar endorsements were also obtained from William Rowat, the senior Privy Council Office official who had participated in the project during this period¹⁷²; Mr. Mel Cappe, the senior Treasury Board participant¹⁷³; and John Simke, who represented Price Waterhouse, the consulting firm that had worked on the development of the Request for Proposals¹⁷⁴.

Furthermore, we posed the same questions to those who had worked on the project teams managed by the officials listed above. The result was the same: all endorsed the process as being fully in compliance with the requirements of due process and public service norms.

167 See *Proceedings*, 21:10; 21:66-68-69-72; and 21:97.

168 See *Proceedings*, 8:39.

169 See *Proceedings*, 3:42.

170 See *Proceedings*, 6:29.

171 See *Proceedings*, 6:80.

172 See *Proceedings*, 11:30.

173 See *Proceedings*, 14:60.

174 See *Proceedings*, 15:12.

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A useful general assessment of the impact of lobbyists on the development of the Request For Proposals, was provided by Minister Corbeil. His view was that a politician who cuts out all communication is not doing his job, and the fact that lobbyists representing special interests were heard along with everyone else enabled a better Request For Proposals to be developed. It remains the Minister's responsibility, however, to make a good decision after hearing representations¹⁷⁵. After twenty years in politics, Minister Corbeil was fully confident in his ability to do this. Looking back on the entire process which ultimately produced the Pearson Agreements, Minister Corbeil declared:

I solemnly state that the agreement respecting Terminals 1 and 2 of Toronto's Lester B. Pearson International Airport was reached in early August 1993 in absolute compliance with the laws that govern us and with the principles of honesty, probity, integrity and equity that characterized our institutions. I also state, Mr. Chairman, that the public interest guided the actions of all participants in this collective success of which I am particularly proud.¹⁷⁶.

In the course of our hearings, we found no evidence to contradict participants' affirmation of the complete integrity of the process of preparing the Request For Proposals for the redevelopment of Terminals 1 and 2. The safeguards in the process to ensure that private interests do not override the public interest in the course of implementing public policy were observed, to the letter.

B) Policy

As has been seen, the Minister's decision to proceed with the release of a Request For Proposals required a review of changes in the circumstances of Pearson Airport to determine that nothing had happened that would call into question the 1990 policy decision to proceed with redevelopment by means of a long term lease to a private sector consortium of Terminals 1 and 2. In our view, the reasons raised by the Minister and officials for proceeding remain compelling.

Indeed, the evidence suggests that no one was arguing against development. The need for modernization of the terminals was undeniable; the only arguments were about its pace, and the appropriate role of the private sector.

(i) The Airlines

The airline's central objection was to the pace of development, which does not imply an objection to the involvement of private sector developers. Indeed, Air Canada had itself

175 See *Proceedings*, 21:69-70.

176 See *Proceedings*, 21:87 and 21:10.

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not long before this period worked in partnership with Paxport to jointly submit an unsolicited proposal.

The illogic of tying the two concerns is illustrated, in our view, in the letters submitted to the Minister by the Canadian Air Transport Association, where protests against the involvement of private sector developers are combined with arguments that Air Canada, a private sector firm, should be able to control development.

The logical response to the airlines' concerns was to place requirements in the Request For Proposals to ensure that development would not impose excessive costs on the airlines, and would take place at a pace that they and other tenants could afford. This was done. Under the "Pricing Strategies" sub-heading of the section devoted to management and operations, the Request For Proposals required proponents to provide a detailed description of fees and charges to be levied upon airlines, and to include:

the role that airlines will be able to play in controlling or influencing fees and charges that will be levied on them, and the role that airlines will play in deciding on the scope and timing of developments that will impact on fees and charges.¹⁷⁷

As well, it was indicated that the evaluation of proposals would specifically address the degree to which they accommodated the expectations of clients and business associates.¹⁷⁸

Our conclusion, confirmed by the eventual ratification of the Pearson agreements by Air Canada, is that the concerns of the airlines were fully and satisfactorily addressed in the Request For Proposals.

(ii) Local Airport Authority Advocates

The local airport authority objection was also not a protest against development. Indeed, officials of Greater Toronto Area involved in the attempt to form a local airport authority consistently affirm that development of the terminals was needed. This position was clearly expressed in a 6 March 1992 letter from Mr. Alan Tonks, Chairman, Metropolitan Toronto Council to the Hon. Michael Wilson, at this time Minister for International Trade, Industry, Science and Technology and senior political minister for the Toronto area. After affirming his support for a local airport authority while noting that difficulties continued to beset the attempt to form such an authority in the Toronto area, Mr. Tonks wrote:

177 *Request For Proposals*, p. 25.

178 *Ibid.*, p. 48.

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These problems may be quickly solved, but other matters such as runway and terminal capacity need to be addressed now. Privatization of T1 and T2 should, in my opinion, proceed as long as the future option for a viable authority is not precluded.

As has been seen, a prospective local airport authority had yet to be established as of 1992, and no significant progress had been made in forming one despite a clear indication in 1990 of the government's intention to proceed with the modernization of the terminals. Establishing a local airport authority to guide development was thus not a practical option at the time.

Delaying development while awaiting the emergence of a local airport authority would have gone against the Minister's own well-founded conviction that development was needed immediately (especially in Terminal 1). It also would have drawn strong opposition from the Mayor of the municipality in which Pearson was located, who was calling on the government either to repair Terminal 1 or board it up.

Delay was, furthermore, unnecessary in order to ensure that terminal redevelopment would not preclude the establishment of a local airport authority. As has been seen, Minister Corbeil was assured by officials that the terminal redevelopment project by no means rendered the establishment of a local airport authority unnecessary, since substantial managerial responsibilities could still be assumed. Furthermore, the Request For Proposals required that the ground lease for the terminals be transferable to a local airport authority, meaning that a recognized authority would acquire substantial rights relating to the project itself¹⁷⁹.

The imprecision of the policy framework on recognizing local airport authorities inherited by Minister Corbeil when he assumed the Transport portfolio, undoubtedly contributed to the problems that arose with the announcement of the government's intention to go ahead with a Request For Proposals. The Minister's resistance to a local airport authority sponsored by the provincial government was directly based on the 1989 "Supplementary Principles" document, which defined an LAA as an organization representing local business and community interests. The 1987 policy, however, had appeared to open the door to direct provincial participation by defining local airport authorities much more widely, and including provincial governments on the list of possible participants. Because the 1989 supplementary principles did not supersede the 1987 policy, the existence of two models left room for legitimate confusion on the part of organizations with respect to the requirements for recognition. The policy framework thus did not fully meet a basic effectiveness test: it created problems for the Minister rather than helping to resolve them.

¹⁷⁹ *Ibid.* p. 31.

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Our conclusion is that the case for delaying redevelopment in order to accommodate advocates of a Toronto local airport authority was no stronger in 1992 than it had been in 1990. If anything, it was weaker, since the Request For Proposals provided tangible evidence that terminal redevelopment would not preclude the establishment of a local airport authority, and indeed could eventually be managed by such an authority.

(iii) Technical Issues

The development of the Request For Proposals raised a host of more specific technical issues, which by their nature required the Minister to rely heavily on advice from officials. The Minister has affirmed that he worked to address all these issues on a consensus basis with the appropriate officials, and we have heard no evidence from any of the officials (or otherwise) which would suggest the contrary.

It is noteworthy that the officials upon whom the Minister relied for advice and technical guidance had no reason to favour Paxport or any other proponent, were obliged as public servants to ensure a fair competition, and have sworn that this was done.

Our conclusion is that the technical requirements of the Request For Proposals reflect the complete success of the Minister and officials in maximizing the public interest through a fair competitive process. Considered collectively, the technical requirements of the Request For Proposals challenged the private sector to provide the Government, and Canadians, with innovative solutions to the need for modernization of the Pearson terminals and to participate in a fair and open competition to determine which proposal would be selected.

(iv) Lobbying Issues

Unquestionably, the developers lobbied extensively on behalf of Request For Proposal requirements which would favour their corporate strengths. Our investigation has revealed nothing sinister in this fact. Minister Corbeil and his officials made independent judgements, with respect to each of the issues which had to be addressed in developing the Request For Proposals, and rejected lobbyists' proposals which, in their view, were not in the public interest.

Thus, for example, Mr. Hession lobbied on behalf of Paxport's preference for a "contract definition" approach to development, which would have involved collaboration between the Government and a selected developer in establishing requirements and defining a development plan. Such an approach avoided the risk that investments in proposal development would produce no return which a competitive process posed to developers. Mr. Hession's efforts were, however, unsuccessful. Efforts to persuade the government to require that Terminals 1 and 2 compete with Terminal 3, which would have excluded ATDG (and

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its major owner, Claridge) from responding to the RFP, were also unsuccessful. Equally, Claridge's initial opposition to the timing of the Request For Proposals (which they believed would result in slower growth of passenger volume and revenue at Terminal 3) was not successful.

The Minister and officials had their own reasons for doing what they did, reflective in part of advice they were receiving from independent consultants supporting the Request For Proposal development process. If the adoption of certain requirements reflects the success of Mr. Hession's efforts at persuasion, this only testifies to the fact that Mr. Hession has a very considerable knowledge of government and of the kinds of public interest-based arguments which are likely to be given weight by public officials.

Our conclusion reflects a systematic effort, during our hearings, to get to the bottom of allegations that lobbyists (or Paxport in particular) somehow exercised a sinister influence over the terms under which proponents would compete. **We find no evidence that the Request For Proposals was anything but immaculately fair. Indeed, as a concrete example of the fresh thinking called for by the 1987 airports management policy, it was exemplary.**

“We wanted their [Paxport’s] proposal. We wanted their building.”

John Desmarais
Transport Canada

In the case of the Pearson process, the release of the Request For Proposals marks an important milestone in the shift from political decision-making and policy direction to the implementation of decisions by the public service. The Request for Proposals essentially defined the objectives established by the Minister of Transport and Cabinet. With its release, the focus shifted to officials whose job it was to ensure that these objectives were met as effectively and efficiently as possible through a fair competition among proponents.

To select a proponent with whom a deal could be negotiated, public servants ensured that proposals met the objectives set out in the Request For Proposals, dividing their work into two distinct phases.

In the first phase, which covers the submission of proposals, Transport Canada officials provided advice to proponents, implemented a ministerial decision to extend the submission deadline, and received proposals.

In the second phase, the proposals were evaluated and a recommendation provided to the Minister, who also received a supplementary audit initiated by the Minister of Industry, the Hon. Michael Wilson. A Best Overall Acceptable Proposal was subsequently announced.

1. The Submission of Proposals (16 March 1992 - 13 July 1992)

A) The Proponents

The release of the Request For Proposals gave interested developers the green light to complete proposals. As has been seen, work was already underway, based on whatever information proponents had been able to glean about the likely requirements in the RFP and departmental feedback to inquiries. Nevertheless, the preparation of finalized proposals made substantial demands on all proponents.

Mr. Hession, reviewing Paxport's activities at this time, advised us that the submission period initially announced had been "certainly, undoubtedly, demanding," but not unfair or inappropriate and, indeed, fully consistent with normal practice in public sector

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contracting¹⁸⁰. During this period, Paxport assembled at its Bloor Street headquarters a team of principals and consultants, at its peak numbering nearly sixty people, who worked intensively to prepare a 2,000-page proposal. According to Mr. Hession, a central focus of the Paxport effort was to identify and satisfy the requirements of the passengers using the airport. The firm of Decima Research was engaged to conduct public opinion research for this purpose. As well, Paxport assessed the characteristics of world-class international airports, drawing directly on advice from officials at Amsterdam's Schiphol Airport, regularly ranked at the head of this group, through a five-year consultancy arrangement whereby a Schiphol employee was transferred to the Paxport team¹⁸¹.

According to Mr. Hession, the resulting proposal had four fundamental features: (1) it provided a higher return to Canadian taxpayers than the status quo; (2) it enhanced the competitiveness of the airlines by providing modern facilities at fair rents; (3) it delivered the redeveloped facilities at a per passenger cost below the North American average; and (4) it achieved a reasonable and adequate return on investment for Paxport shareholders¹⁸².

The information we received from representatives of Paxport's competitor, Claridge was less detailed than that provided by Mr. Hession, but it did show the general outlines of Claridge's activities during this period. According to Mr. Coughlin, President of Claridge Properties Ltd., he was approached, shortly after the issue of the Request For Proposals, by Mr. Jim Bullock, the coordinator of the Ontario government's attempts to organize a Local Airport Authority (the Southern Ontario Airport Authority) for the purpose of submitting a proposal. Claridge agreed to participate in a joint proposal, and beginning in April 1992 its team of professionals commenced work on its preparation.

This activity continued until late May or early June 1992, when the attempt to form a Local Airport Authority was abandoned as a result, according to Coughlin, of disagreement among Toronto municipalities over a structure¹⁸³.

While this abandonment was viewed as a setback, Claridge decided to proceed on its own with the proposal, after receiving an extension of the proposal submission deadline from Transport Canada. This permitted the Claridge proposal to be accepted when it was submitted on 13 July 1992¹⁸⁴. Mr. Coughlin attributed the need for extra time to the unusual circumstance created by the withdrawal of Claridge's partner, and described the original

180 See *Proceedings*, 8:75.

181 See *Proceedings*, 8:40.

182 See *Proceedings*, 8:76.

183 See *Proceedings*, 17:12 and 17:72.

184 See *Proceedings*, 17:12.

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ninety-day period as "reasonable"¹⁸⁵. Indeed, he claimed that even had an extension been refused, Claridge would still have been able to submit its proposal, although in a less polished form.

The proposals from Paxport and Claridge were the only ones accepted. The firm of Morrison Hershfield also submitted a proposal but opted not to provide the \$1 million deposit required under the terms of the Request For Proposals. Its proposal therefore did not qualify for consideration by Transport Canada.

While we did not have the opportunity to discuss the Morrison Hershfield proposal directly with its proponent, we were provided with documents used by this firm as the basis for a presentation given to the Nixon review in the fall of 1993. These documents indicate that the firm advised Mr. Nixon that its proposal was "outside the RFP," ie. that its proposal did not meet requirements contained in the Request For Proposals. This recognition was based, in part, on fact that the proposal did not involve the transfer from the government to the private sector of staff or capital investment.

2. Within the Department

The Minister and departmental officials faced one significant decision during this period, Claridge's application for an extension of the submission deadline. Minister Corbeil's testimony suggests that the deadline extension was viewed as something of a foregone conclusion, given the position announced on release of the Request For Proposals. The deadline was extended to 13 July 1993, increasing the time for preparing proposals to some 127 days.¹⁸⁶

Mr. Hession appears to have protested vigorously, on behalf of Paxport, on hearing that an extension was under consideration. A letter dated 9 June 1992¹⁸⁷ alludes to a conversation of 4 June during which Mr. Hession had apparently stated that (1) Paxport would be ready by the original deadline, and (2) a delay would increase project costs and expose Paxport to possible industrial espionage or inadvertent disclosure. A polite response was prepared for signature by the Deputy Minister, reminding Mr. Hession that on release of the Request For Proposals the Minister had declared his readiness to consider requests for extension by serious proponents, in view of the shortness of the submission period.

According to the current Deputy Minister, Mr. Nick Mulder, the normal practice of departmental officials at this juncture is to provide to all competitors any information

¹⁸⁵ See *Proceedings*, 17:74.

¹⁸⁶ See *Proceedings*, 21:34.

¹⁸⁷ Raymond Hession to Huguette Labelle, Committee document LA 001538.

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provided to one, and to attempt where possible to do so in a forum open to all participants¹⁸⁸. Reflecting this practice, the document room set up in Toronto was proponents' first source of information. In addition, departmental documents refer to "extensive requests" from proponents during the April/May 1992 period for site inspections and other technical information¹⁸⁹.

In addition to providing information, departmental officials finalized the evaluation arrangements during this period. These activities were described for us by Mr. Lane, head of the evaluation team. Between March to June 1992, the team (organized in five sub-committees established to evaluate proponent qualifications, development plans, maintenance and operation plans, transfer plans and business plans) worked in Ottawa to finalize the evaluation criteria, numerical weightings, and evaluation methodology all of which were documented in evaluation work books for use by the individual evaluation committee members¹⁹⁰.

The description given us by Mr. John Cloutier, co-chair of the transfer plan evaluation sub-committee, suggests that each sub-committee exercised substantial responsibility in its area of speciality. The transfer evaluation plan sub-committee, composed of specialists from both the department and outside, worked between March and June to develop the detailed elements of the rating criteria and the plan in line with the global approach of the team¹⁹¹.

The same picture of relatively autonomous work by specialists on the sub-committees emerged from the testimony of Mr. D.G. Dickson, a member of the business plan evaluation sub-committee. According to this testimony, this sub-committee would seem to have relied on non-public service specialists somewhat more than did the other sub-committees, reflecting the nature of its work. During this preparatory period, the sub-committee engaged the firm of Richardson Greenshields to provide professional accounting and financial advice for the duration of the evaluation process¹⁹².

These efforts were required to ensure that the evaluation process complied with one of the broad requirements of "due process", that a fully developed evaluation methodology should be prepared before consideration of any proposals. Price Waterhouse, the consulting firm supporting the proposal process, was to ensure that these requirements were met. That firm's role did not encompass the assessment of such substantive elements of the process as

188 See *Proceedings*, 2:23.

189 *Minutes of meeting* of May 20, 1995, Committee Document LA 000352.

190 See *Proceedings*, 6:48.

191 See *Proceedings*, 6:51 and 6:56.

192 See *Proceedings*, 6:52.

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the weightings assigned to the various evaluation criteria. Mr. John Simke of Price Waterhouse informed us, however, that objections would have been raised had the guidance to proponents in the Request For Proposals not been reflected in the evaluation methodology. There were, apparently, no concerns of this kind¹⁹³.

According to Mr. Lane, the preparation phase was concluded when the committee co-chairmen signed off all the documentation and evaluation booklets, after which point no deviations from the process were permitted. Also at this point, the Minister was presented with all the documentation for review. No attempt was made to alter the methodology as submitted¹⁹⁴.

During the preparation period, as well, evaluation team members decided on the appropriate time-frame for the evaluation. According to Mr. Lane, team members decided that since proponents had been able to prepare proposals in approximately three months, it would be reasonable for them to "have a shot at evaluating them in two months"; the aim was to prevent the process from bogging down in second guessing. Thus two months became the working timetable. Mr. Lane assured us that there were no external pressures on the team to move fast. On the contrary, the team was told to take whatever time was required¹⁹⁵.

A final preparation within the department was an evaluation by Price Waterhouse of the commercial opportunity associated with the project. The purpose of this exercise was to identify for the government a range within which a financial offer by a private developer could be considered reasonable.

To provide estimates, Price Waterhouse developed two general scenarios: a conservative approach which projected revenues from airlines at a cost-recovery level, and an optimistic approach which projected revenues based on what airlines might be prepared to pay, using Terminal 3 revenue as an indicator. Under the conservative scenario, the value of the rights to operate the terminals was estimated at between \$127.6 million and \$311.3 million. Using the optimistic scenario, the estimated range was \$342.8 million to \$561.4 million¹⁹⁶.

193 See *Proceedings*, 15:12.

194 See *Proceedings*, 6:52.

195 See *Proceedings*, 6:53.

196 *Transport Canada Valuation of the Commercial Opportunity Associated with Redeveloping Terminals 1 and 2 of Lester B. Pearson International Airport, July 1992* also see *Proceedings*, 15:5.

3. Other Activity

A) Local Airport Authority Activities

The official proposal development period seems to have seen the emergence of several competing local airport authority initiatives, although our evidence does not provide precise dates for their initiation and termination. It would appear that while the attempt to form the Southern Ontario Airport Authority and submit a bid jointly with Claridge was collapsing, supporters of the Greater Toronto Regional Airport Authority continued to prevail upon the Minister to delay the process. According to Mr. Harrema, Chair of the Durham Regional Council, letters were written, and local Members of Parliament, among others, were approached¹⁹⁷.

According to Mr. Gardner Church, whose role as Minister for the Toronto region placed him at the centre of provincial attempts to foster a proposal by a Local Airport Authority, "some fairly spectacular efforts" were made to organize a credible bid. The Request For Proposals, required a detailed technical submission which would have been, however, "very difficult" to develop within the specified time-frame¹⁹⁸. Church testified further that this attempt was subsequently abandoned, when the federal government indicated that federal local airport authority recognition policy precluded provincial government involvement¹⁹⁹.

The effort to form the Southern Ontario Airport Authority, combined with the Mayor of Mississauga's opposition to the GTRA and her support for immediate redevelopment, could only have strengthened the impression formed by Minister Corbeil and federal officials of significant dissensus among the municipalities directly affected by Pearson Airport²⁰⁰. We note, too, that the developer involved in the Southern Ontario Airport Authority joint venture ascribed its demise to the absence of sufficient support among the Toronto municipalities. This would confirm the view of federal officials rather than that of Mr. Church.

B) Lobbying

According to Paxport's coordinating government relations consultant, Mr. William Neville, lobbying on behalf of Paxport during this period focused on the general briefing strategy mapped out before the issue of the Request For Proposals. The briefing of interested

197 See *Proceedings*, 5:19.

198 See *Proceedings*, 5:25.

199 See *Proceedings*, 5:25.

200 See *Proceedings*, 8:19.

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parties, which included local Members of Parliament of all parties, was substantially carried out by Mr. Hession, using materials prepared by lobbyists.

According to Mr. Neville, all activities following the release of the Request For Proposals recognized that "those actually making the decision are off-limits"²⁰¹. We note that adherence to this principle by not only Mr. Neville but the other lobbyists involved in the Pearson process was confirmed by departmental officials²⁰².

Mr. Harry Near and Mr. Bill Fox of the Earnscliffe Group, which acted for Claridge during this period, provided an overview of activity during the spring, summer and fall of 1992. As the proposal was developed, the communications aspect of Earnscliffe's work became more prominent. Mr. Bill Fox, who exercised primary responsibility for Earnscliffe's communications and public opinion research work, described the major elements of preparatory communications work: development of a full audio-visual presentation supporting the proposal; printed materials such as news releases and background papers, speech drafts and talking points, a media contact program, and coaching the Claridge people who would actually make the presentations²⁰³.

As the submission deadline approached, the focus shifted to assisting representatives of Claridge in making representations to public service officials in the lead departments for the Pearson process: Transport, the Privy Council Office, Finance and Industry. Representations were also made to politicians, especially those from the Toronto area, as well as political staff²⁰⁴. As of early July, according to our information, target lists had been prepared assigning designated officials to various individual members of the lobbying team. Included on the list, according to Mr. Near, were officials expected to be involved in the decision-making process²⁰⁵.

The account from representatives of Earnscliffe was broadly consistent with that from Mr. Herb Metcalfe, Capital Hill Group, on activities during this period. According to Mr. Metcalfe, the early representations to elected and public service officials also served as a means of gathering information on the likely key requirements of the government, which could then be fed into the proposal development process²⁰⁶. Also according to Mr. Metcalfe,

201 See *Proceedings*, 16:18.

202 See Observations and Conclusions to this Chapter.

203 See *Proceedings*, 15:83.

204 See *Proceedings*, 15:82 and 119.

205 See *Proceedings*, 15:92-93 and 127.

206 See *Proceedings*, 15:120.

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the scope of contacts and activities carried out with respect to the Pearson terminals were typical for an undertaking of this type²⁰⁷.

4. The Proposals

On 13 July 1993, Transport Canada accepted two competing proposals for the redevelopment of Terminals 1 and 2, each running to several thousand pages when supporting documentation is included. Each proposal, as required by the Request for Proposals, was accompanied by a deposit of \$1 million and constituted an irrevocable offer valid for a period of eighteen months starting from the submission deadline. In general, the proposals offered very distinctive approaches to meeting the objectives set out in the Request For Proposals. Their broad outlines nevertheless provide a useful reference point for consideration of the evaluation exercise²⁰⁸.

A) The Claridge Proposal

The main operational aspects of the Claridge proposal were as follows. Terminal 1 would ultimately be replaced. Terminal 2 would be extended and a new pier created in the location now occupied by Terminal 1. A plan for shifting traffic to Terminal 3 and a satellite during construction was included. Modifications to access roads and expanded parking were provided for. Development would be in two phases (1993-1998 and starting in 2004) and would involve capital expenditures of some \$758.3 million.

The Claridge proposal provided for an unconditional initial quick-start investment of \$130 million, reimbursement to Air Canada of \$30 million for its recent investments in Terminal 2, and the phasing in of charges to airlines up to a level comparable to that of Terminal 3, following Claridge's initial investment.

The offer to the Crown consisted of a combination of (1) a \$30-million lump sum payment (which included payment for chattels), (2) base rents of \$7.5 million for each of the first six years, rising by \$2.5 million every five years to a ceiling of \$40.5 million in year 59 of the lease, and (3) a percentage of rentals that would increase with dollar volumes (from 3% of the first \$70 million to 25% of all rental revenues over \$200 million).

207 See *Proceedings*, 15:132.

208 See Transport Canada, Airports, *Proposal Evaluation - T1/T2 Terminal Redevelopment Project*, October 1992.

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B) The Paxport Proposal

The Paxport proposal also involved the eventual replacement of Terminal 1, extension of Terminal 2 and creation of a new pier where Terminal 1 is now located. This proposal also provided for expanded parking, a new office complex and hotel, and a new administration building. Also proposed was extensive realignment of the airport road system, along with the relocation of long-term parking and taxi/limousine areas. Development was proposed in four stages, running from 1993 to 1999, and involving total capital investment of \$858 million.

The Paxport proposal provided for a conditional early start option involving investment of \$150 million, tied to management and operation of all concession space and parking with revenues going to Paxport. It also provided for the reimbursement to Air Canada of \$36 million for its recent investments in Terminal 2, to be paid over the term of the Air Canada lease. Increased charges to airlines were to be phased in over four years.

The offer to the Crown consisted of a combination of (1) a \$7-million initial payment for chattels in the terminals; (2) base rent of \$27 million rising to \$30 million by year 4, and adjusted annually thereafter for inflation and passenger volume; and (3) a substantial (30.5) percentage of rentals less base rent, which would increase with dollar volumes over a \$125-million threshold. Separate flat rates (adjusted for inflation) for utilities and stipulated land parcels were proposed.

In addition to the above, the Claridge and Paxport proposals provided differing plans for management and operations, the transfer of federal employees and industrial benefits.

5. The Evaluation of Proposals (14 July 1992 - 7 December 1992)

After the submission of proposals, the Pearson process centres for several months on events within the department and initially on the evaluation team itself, which had been mandated to carry out a pre-established process insulated from both departmental and outside influence.

A) The Work of the Evaluation Team

On 13 July 1993, the due date for the proposals, the evaluation team was in the process of moving to Toronto. The move had been requested by Mr. Lane, who was in charge of the process, in order to detach members of the team from their normal duties. As well, the distance of Toronto from Ottawa would make it easier to maintain the

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security of the process, and gave the evaluation team direct access to the specialized expertise of the Toronto project team²⁰⁹.

When the proposals arrived, they became subject to stringent security procedures to preclude alteration during the evaluation exercise and safeguard commercial confidentiality. The procedure involved storage of the original copy in a vault and delivery of working copies to the process auditor (Raymond, Chabot, Martin, Paré), who controlled access and use for the duration of the evaluation²¹⁰.

What ensued was a period of intensive work by the five evaluation sub-committees. According to Mr. Lane, the circumstances enabled participants to be fully immersed in the evaluation activity; they frequently worked very long days in order to stay on schedule. The Assistant Deputy Minister, Airports, came by to offer encouragement but, aside from this, the team worked essentially on its own²¹¹.

As the sub-committees completed their reports, they were brought before the main evaluation committee, where other members were encouraged to challenge any aspect of the contents, including findings and explanations. Several sub-committee teams were "sent back," primarily to ensure that their explanations of the ratings were complete, before all the challenges raised in the main committee were satisfactorily met²¹². At the conclusion of the process, on the basis of unanimity over findings and ratings and general consensus over other elements, the committee developed its overall conclusion.

Since issues relating to the financial viability of proposals and proponents were later to surface persistently, we questioned the officials who had participated in this aspect of the evaluation with particular care. They advised us that the firm of Richardson Greenshields hired to support the evaluation of business plans, had conducted a due diligence search on the proponents and provided information and advice relating to the financial health of the consortia that had submitted proposals.

On the basis of this information obtained, Richardson Greenshields advised the business plan evaluation sub-committee that, in their view, there was a reasonable probability that each proponent would be able to finance the project outlined in its proposal²¹³. The business plan sub-subcommittee (and subsequently, the full evaluation committee) concurred in this advice. However, issues relating to the ability of the consortiums to actually

209 See *Proceedings*, 6:49.

210 See *Proceedings*, 6:56.

211 See *Proceedings*, 6:49.

212 See *Proceedings*, 6:65.

213 See *Proceedings*, 6:68 and 6:71.

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demonstrate that financing was in place, and that arrangements had been made with major tenants such as the airlines which would ensure an adequate revenue stream to the developer, would remain to be addressed at a later date²¹⁴.

On 28 August 1992, the evaluation committee completed its work and submitted its unanimous recommendation to the Department. It found the Paxport proposal superior in four of the six categories rated: development plan (25% weighting); business plan (40% weighting); management and operations plan (20% weighting); and industrial benefits (5% weighting). The Claridge proposal was found to be superior in two areas: proponent qualifications (5% weighting) and employee transfer plan (5% weighting).

The committee concluded that the Paxport proposal qualified as the Best Overall Acceptable Proposal (BOAP), having obtained 577 rating points over 497 points for the Claridge proposal.

The committee also found that both proposals met the requirements of the Request For Proposals in the six rating categories. As well, there were a number of conditions and limitations in each proposal that the committee recommended be addressed in the course of negotiating a formal agreement²¹⁵.

B) The Process Auditor

As has been mentioned, the firm of Raymond, Chabot, Martin, Paré had been engaged to monitor the evaluation process to ensure that team members adhered to security, confidentiality and broader procedural requirements and audit the entire process following its completion to ensure its compliance with requirements stated in the Request For Proposals, that resources assigned to the evaluation had been appropriate, and that the final recommendation of the evaluation team adhered to the pre-established evaluation criteria and process²¹⁶.

In the monitoring report, dated 26 October 1992, the auditors found that:

- the Proposal Evaluation Committee (PEC) had taken every measure possible to ensure documentation control and confidentiality;
- the PEC had adhered to the predetermined procedures, evaluation criteria and scoring system;

214 See *Proceedings*, 6:71.

215 See *Report of the Evaluation Committee*.

216 *Auditors' Report*, 18 September 1992, Committee document LA 001400; Also see *Terminal Redevelopment Project Monitoring Activities*, 26 October 1992, LA 001420.

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- the private sector members had participated meaningfully in the work of the PEC; and
- the PEC had taken all advice from the Department of Justice into account.

In the process audit report, dated 18 September 1992 but submitted, in finished form, on 26 October as well, the auditors found that:

- the evaluation documentation conformed to the requirements of the Request For Proposals;
- the resources assigned to the evaluation were appropriate; and
- the final recommendation conformed to the predefined evaluation process.

Expanding to the Committee on the work involved in the audit, Mr. Robert L'Abbé, the auditor who led the Robert, Chabot, Martin, Paré team, told us that, among other precautions, the auditors had reviewed the application of the evaluation criteria. Wherever they found an apparent discrepancy in the work of any of the evaluators, they assessed its possible impact on the outcome. Mr. L'Abbé was thus able to assure us that any discrepancies would not have affected the overall ratings and to confirm the finding of the evaluation committee²¹⁷.

The auditors also assessed the impact of charges to the airlines on the returns anticipated in the proposals. This was done in order to determine whether the results of the evaluation would have been altered by deletion of a charge to the airlines proposed by Paxport, but not by Claridge. The financial viability of Paxport's proposal was found not to depend on the charge to the airlines. In the absence of charges to the airlines, sufficient cash flow could be generated from operations to pay the proposed rent to the Crown. Although the auditor's task was not to evaluate the proposals, their financial analysis found that the structure of the financial offer from Paxport was:

...substantially more interesting to the Crown than was that of ATDG. In fact, the fixed amount and percentage rate of return constituting the rent are much greater than ATDG's proposed rent could ever be²¹⁸.

C) The Edlund/Curran Report

The next development in the chain of events leading to the public announcement of the best acceptable proposal involved a form of political intervention. Interestingly, its effect was to slow the pace of decision-making rather than to accelerate it, and to raise additional difficulties for the Paxport proposal, rather than to smooth its path.

217 See *Proceedings*, 7:54.

218 *Appendix 2, Use of Financial Model, Auditors' Report, Proceedings*, 7:65-66.

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According to Mr. Harry Swain, Deputy Minister of Industry during these events, the Hon. Michael Wilson became concerned about the Pearson Airport process, in the fall of 1992. His interest reflected his role as lead minister for the Toronto area, and a member of the inter-ministerial committee which had been established to involve ministers whose mandates related to the T1/T2 project. Minister Wilson's concern focused on the financial capacity of the proponents to implement their proposed development plans over the lengthy period involved in the proposals²¹⁹.

As a result, Mr. Swain arranged with Mrs. Labelle, Deputy Minister of Transport, for two officials from the Department of Industry to travel to Toronto and inspect the full range of proposal and evaluation documentation generated to that point. The two officials, Ms. Connie Edlund (a chartered accountant) and Mr. Al Curran subsequently submitted a report to Mr. Swain on 8 November 1992²²⁰. Their study had involved a two-day information gathering phase at the project site in Toronto, followed by approximately two weeks of review and analysis in Ottawa during late October 1992²²¹.

We were advised that, because of the short time in which it was completed, the Edlund/Curran report focused narrowly on financial issues. Its major finding was that a range of concerns about the Paxport proposal rendered the Claridge proposal preferable in terms of financial soundness. The authors found that the amount of equity in the Paxport proposal "appeared insufficient," at \$66.5 million representing only 8% of the total financing required versus the \$130-million equity (33% of the financing required) proposed by ATDG²²². The Paxport proposal also envisioned the injection of an additional \$40 million through the issue of public shares in 1996; however, according to Ms. Edlund, this still fell short of desirable levels. Edlund and Curran also had concerns that the additional equity might not be able to be raised, although these concerns were moderated by a statement from Wood Gundy that Paxport "should not have undue difficulty raising the required debt"²²³.

According to Ms. Edlund, the Paxport proposal depended heavily on operating cash flows both to finance development and to provide the proposed return to shareholders, 10 per cent to commence immediately. The revenue returns projected in the proposal were, however, "overly optimistic" in the view of the Industry Canada officials²²⁴. A particular concern was Paxport's plan to renegotiate existing leases and concessions at higher rates,

219 See *Proceedings*, 7:5.

220 See *Proceedings*, 7:13.

221 See *Proceedings*, 7:31.

222 See *Proceedings*, 7:7.

223 See *Proceedings*, 7:19.

224 See *Proceedings*, 7:6.

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described in the report as resting on an "heroic assumption" that airlines and other parties would be able and willing to absorb substantial increases²²⁵.

Furthermore, their examination of the financial condition of the Paxport partners led Ms. Edlund and Mr. Curran to doubt the ability of these to make up the difference in the event of cost overruns, revenue shortfalls, or problems with the public offering. The condition of the Matthews Group, Paxport's largest shareholder, was a particular concern²²⁶. Its debt load of \$250 million was seen to be high, with no immediate upturn likely in its major business sectors²²⁷.

Finally, the report addressed the fees designated as "management fees" in each proposal²²⁸. They concluded that Paxport's forecasted management fees "seemed high"²²⁹. According to Edlund and Curran, Claridge's management fees rose to a ceiling of approximately 15% while those of Paxport rose from 24% in 1993 to 42% by 1998, staying constant after that date. While Claridge's fee was seen as "somewhat reasonable," the report describes Paxport's fees in clearly negative terms: "When taken with the shareholder's high dividend demand however, they are, perhaps an indication of rapacity"²³⁰. Mr. Swain later provided an implicitly harsher assessment, describing even Claridge's 15% fee as "already very high," and suggesting that fees in the 5% to 8% range would be more reasonable for a project of this nature²³¹.

The main positive conclusion of the study appeared to be that, if all Paxport's forecasts proved accurate, its rental payments to the Crown would be "significantly higher" than those proposed by Claridge: three times those of Claridge during the construction phase and twice those of Claridge following the completion of construction²³².

According to Mr. Swain, the study was provided to Mrs. Labelle, Deputy Minister of Transport, and to Mr. Shortliffe, who had by this time become Clerk of the Privy Council. Department of Industry officials did not seek or receive any reaction to the study, or information about its subsequent use²³³. Although we have received no direct evidence about

225 See *Proceedings*, 7:19.

226 See *Proceedings*, 7:7.

227 See *Proceedings*, 7:18.

228 See *Proceedings*, 7:23 and 7:42.

229 See *Proceedings*, 7:7.

230 See *Proceedings*, 7:10.

231 See *Proceedings*, 7:24.

232 See *Proceedings*, 7:6.

233 See *Proceedings*, 7:44.

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what was done with the Edlund/Curran Report by the Department of Transport, it was challenged during our hearings by two experienced financial analysts.

For example, according to Mr. Keith Jolliffe who, as Director of Corporate Planning and Special Projects provided financial advice at various stages of the project, the Edlund/Curran Report may not have provided definitive information about the management fees to be charged by Paxport. Mr. Jolliffe advised us that the 42% figure in the Report reflected a poor choice of comparisons, showing management fees as a proportion of only one component of total overhead. Had the management fees been expressed as a percentage of total operating and maintenance costs, they would have been in the vicinity of 10%, well within the range of acceptable overhead management fees.

Mr. Stehelin of Deloitte & Touche, who provided financial advice to the Department after the award of the Best Overall Acceptable Proposal, also advised us that this calculation was erroneous. According to Mr. Stehelin, the Paxport management fee would have been in the range of 4 to 5 percent of gross revenue, normal in the industry.

In retrospect, the Edlund/Curran Report did not provide a valid basis for discarding the recommendation of the Department's evaluation process. It was conducted in an extremely short time-frame, and its focus was limited to one of the six criteria used in the departmental evaluation process to ensure consideration of all the major implications of the proposals. The appropriate use of the Edlund/Curran Report was as a means of identifying potential concerns within its very narrow perspective.

The essential concerns raised by the Edlund/Curran Report were reflected in the list of issues that would guide negotiations during coming months. The main issue, financeability, was identified as an immediate focus of discussions in the announcement and, as will be seen, was pursued with great rigour during subsequent phases of the process. Individual items such as the management fees charged by the proponent were also addressed during negotiations.

D) The Lobbyists

As has been seen, lobbyists had generally focused on building support for their proposals across the range of Pearson Airport stakeholders during the evaluation phase. Their efforts continued during the run-up to the announcement, along with attempts to monitor developments within the department.

Not until the week before the announcement, however, did Claridge's lobbyists begin to hear rumours in Ottawa that the government was close to announcing a decision in favour

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of Paxport²³⁴. According to Mr. Near, the weekend before the announcement, Earnscliffe and Claridge developed a strategy for persuading the government to be as stringent as possible with respect to the demonstration of financeability to be required from the winner. This approach was consistent with Claridge's representations earlier in the fall, and reflected Claridge's belief that its proposal could supersede Paxport's if financial requirements were sufficiently emphasized²³⁵.

The Earnscliffe/Claridge strategy took the immediate form of a memorandum, faxed to Mr. Shortliffe early on the morning of 7 December 1992, providing a draft announcement setting out a series of requirements that the winner should be required to meet. These included a deposit of \$100 million by 31 December 1992, and an agreement in principle with Air Canada on new lease terms consistent with the proposal, by the same date. The Earnscliffe/Claridge draft would also have had the government announce the transfer of 3 million passengers from Terminal 1 to Terminal 3, and commit itself to commence negotiations with Claridge immediately upon any failure by Paxport to meet its conditions²³⁶. The government did not, however, adopt any of these suggestions.

6. Announcing the Best Overall Acceptable Proposal

The issue of whether or not to proceed with announcement of a best overall acceptable proposal continued to be discussed during November 1992²³⁷. A number of considerations were weighed at this time. These included: Transport Canada officials' view that the need for construction had been deferred until 1996 because of the impact of the recession on traffic volumes; the fact that the earliest possible construction start date had been delayed because of the need for new leases to be negotiated with the airlines; the fact that Air Canada had asked for a postponement; and the possibility that the Ontario government would ask for a delay until a Local Airport Authority could be formed²³⁸.

Minister Corbeil's account of decision-making at this juncture was limited out of concern that Cabinet confidences not be betrayed. He did indicate, however, that the decision to proceed with the process after the selection of a best overall acceptable proposal would normally be made by Cabinet, rather than the Minister in isolation, a pattern to which the Pearson agreement decision-making process conformed²³⁹. He stressed, as well, his confidence in the evaluation process that had recommended the selection of Paxport and his

234 See *Proceedings*, 15:94.

235 See *Proceedings*, 15:97.

236 See *Proceedings*, 15:96-97.

237 See *Proceedings*, 24:65.

238 See *Proceedings*, 24:64 and Committee document LA 002188.

239 See *Proceedings*, 21:15.

view that only a full halt to the redevelopment initiative would have justified not following this recommendation²⁴⁰.

Thus it was decided to proceed with the public announcement of a best overall acceptable proposal. In the announcement, Minister Corbeil outlined the nature of the proposed development, stressing the economic importance of Pearson Airport and the immediate stimulus to the Toronto construction industry that would result. He estimated that 3,200 direct and indirect jobs would be created over the construction period, and that the creation of a world-class airport facility would continue to generate economic benefits by attracting convention and tourism activity.

The announcement also noted the government's concern with changing financial realities in the airline industry. It was noted that Paxport would have to satisfy the Government of Canada as to the financeability of its proposal before the commencement of the negotiations towards a formal agreement²⁴¹.

7. Observations and Conclusions

A) Process

As at other stages, we systematically asked officials who had had significant responsibilities at this stage for their views on the process. In particular, we asked them to state their personal judgements as to whether they had been subjected to requirements for speed that compromised their work, whether their work had been subjected to political interference, whether lobbyists had influenced their decisions and whether, more generally, they were satisfied that the requirements of due process had been met.

Without exception, those responsible endorsed the process in which they had participated. In particular, the evaluation process and subsequent activities within the Department up to the announcement of the best overall acceptable proposal were endorsed by the Hon. Jean Corbeil, Minister of Transport during this period²⁴²; Mrs. Huguette Labelle, Deputy Minister, Transport²⁴³; Victor Barbeau, Assistant Deputy

240 See *Proceedings*, 21:68.

241 Transport Canada, Press Release, "Best Overall Acceptable Proposal Announced for Redevelopment of Terminals 1 and 2 at Lester B. Pearson International Airport," No. 189/92, 7 December 1992.

242 See *Proceedings*, 21:10, 21:65, 21:68 and 21:97.

243 See *Proceedings*, 8:40.

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Minister, Airports²⁴⁴; and Ron Lane, Chairman of the evaluation process and responsible for the development of evaluation criteria²⁴⁵.

Endorsements of the process were also obtained from Mr. Glen Shortliffe, Clerk of the Privy Council during this period²⁴⁶, Mr. William Rowat, who participated in the project during this period as Assistant Secretary to the Cabinet, Economic and Regional Development, Privy Council Office²⁴⁷; Mr. Mel Cappe, the senior Treasury Board participant²⁴⁸; Mr. Robert L'Abbé, auditor of the evaluation and evaluation process monitor²⁴⁹; and John Simke, who represented Price Waterhouse, the consulting firm which supported the evaluation process after having assisted with the development of the Request for Proposals²⁵⁰.

We posed the same questions to personnel who had worked on the project teams managed by the officials listed above. The result was the same: all endorsed the process as being fully in compliance with the requirements of due process and public service norms.

In the course of our hearings, we found no evidence to contradict participants unanimous affirmation of the complete integrity of the process in which proposals were received and evaluated and a best overall acceptable proposal selected and announced. As at previous stages, the safeguards to ensure that private interests do not override the public interest as perceived by the democratically elected representatives of the people were fully operative during this phase of the process.

B) Policy

The central policy issue during this phase of the process centered on the announcement of a Best Overall Acceptable Proposal. This issue raises two distinct questions, to which we give separate attention below.

(i) "Go" or "No Go"

First, the announcement decision required attention to the circumstances of Pearson Airport, along the lines explored in the previous chapter's discussion of the decision to

244 See *Proceedings*, 3:42.

245 See *Proceedings*, 6:80.

246 See *Proceedings*, 24:105.

247 See *Proceedings*, 11:30-31.

248 See *Proceedings*, 14:60.

249 See *Proceedings*, 6:58.

250 See *Proceedings*, 15:13.

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release the Request For Proposals. It is possible that a substantial change in circumstances during the approximately eight months, between the issue of the Request For Proposals and the decision to announce a Best Overall Acceptable Proposal, might have provided a compelling reason for calling a halt to development or seeking alternative ways of getting it done.

As has been seen, Transport Canada officials raised a number of considerations relevant to the 'go-no go' issue, and a decision was reached by Cabinet. Our findings fully support the decision to proceed with the announcement of a Best Overall Acceptable Proposal.

As Transport Canada recognized, the airlines continued to raise concerns about the pace of development, and any increased costs they might have to absorb. These concerns, however, had not been a valid basis for halting the project in March of 1992 and had not become one in November. Indeed, the airlines' demands for postponement implied their recognition that development was necessary; their concern was only that it be affordable.

The logical response to the airlines' concerns in March 1992 had been to ensure that the Request For Proposals stipulated that development would not place excessive costs on the airlines, and would take place at a pace that they and other tenants could afford. The logical response in November of 1992 was to verify that the Best Overall Acceptable Proposal responded to these stipulations, and to flag any remaining concern in this respect for resolution during negotiations.

The government did exactly what was logically required. As has been seen, in October 1992, the firm of Raymond, Chabot, Martin, Paré verified that the evaluation process reflected in the requirements of the Request For Proposal had been carried out in a satisfactory manner. Remaining issues relating to the financial situation of the airlines were clearly flagged in the announcement of the best overall acceptable proposal. The government's course of action fully met the genuine requirements of the airlines in the fall of 1992, and provided the basis for Air Canada's freely made decision to enter into an agreement with the developers during the following year.

The local airport authority situation in November of 1992 was virtually identical to that during the run-up to the issuing of the Request For Proposals. There was no viable candidate for a local airport authority and no significant progress towards forming one, despite the impetus provided by the issue of the Request For Proposals. Indeed, for much of the period between the issue of the Request For Proposals and the decision to announce a best overall acceptable proposal, the LAA situation became increasingly unclear. During this period, rival local airport authority candidates emerged in the Toronto area and the Mayor of Mississauga continued to follow a very independent path with respect to the whole development issue. Recognizing a local airport authority in order to guide development was no more a practical option in November 1992 than it had been in March.

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As in March, a delay in development so as to await the emergence of a local airport authority would have drawn strong opposition from the Mayor of the municipality in which Pearson was located, who was calling on the government either to repair Terminal 1 or board it up. Such a delay would also have gone against the Minister's own well-founded conviction that development was needed immediately (especially in Terminal 1). It would have left the government open to justified criticism that the interests of the broader public were being sacrificed in order to forestall criticism by what was then a tiny, though very vocal, minority which wanted to run Pearson Airport under the aegis of a local authority.

(ii) Which Proposal?

The second option available to the government would have been to proceed with development but set aside or reverse the results of the evaluation committee. As Minister Corbeil recognized, this would have been an extremely serious political intervention in what had by this time become an essentially bureaucratic process, subject to ratification by elected officials at certain key points.

A final consideration is that the decision to announce a Best Overall Acceptable Proposal did not involve an irreversible rejection of the proposal not selected. As we were repeatedly assured by officials and by representatives of Airport Terminals Development Corporation itself, the Claridge proposal stayed on the table. During the informal discussion phase which was to follow the announcement of the Best Overall Acceptable Proposal, the fact that the Claridge proposal remained an option for the Government, having also been found acceptable by the evaluation committee, provided Government negotiators with additional leverage in their dealings with Paxport.

Thus the announcement that Paxport had submitted the Best Overall Acceptable Proposal committed the government to go forward with the next step of the process.²⁵¹

Our overall conclusion is that, between 16 March 1992 and 7 December 1992 the Department of Transport administered an evaluation process of impeccable fairness, and that the announcement of a Best Overall Acceptable Proposal in December 1992 was not merely consistent with the public interest, but required by it.

251 As the response to the RFP constituted by its terms an irrevocable offer on behalf of the proponent for a period of 18 months, it could be argued that the letter of 7 December 1992 from Victor Barbeau to Paxport constituted a conditional acceptance of the irrevocable offer thus committing the government to move forward to deal with the proponents to satisfy the conditions.

"Everybody put a little bit of water in their wine."

William Rowat
Government negotiator

Following the selection of a Best Overall Acceptable Proposal, the central objective of the government and the selected proponent was to reach a detailed agreement specifying all the terms and conditions of a deal. This process involved two broad phases.

In the first phase, which ran from 8 December 1992 to 5 May 1993, discussions were held between government officials and Paxport representatives in order to resolve the pre-negotiation issues identified in the Minister's public announcement. A major development during this period was the formation of a joint venture between Paxport and ATDG, which then carried on discussions with the government.

In the second phase, which ran from 5 May to 7 October 1993, detailed agreements were negotiated, signed and (upon the developers' fulfilment of closing requirements) released from escrow. Adding considerably to the complexity of negotiations during this phase, was the disclosure to developers and negotiators of the 1989 "Guiding Principles," long-term lease document claimed by Air Canada to set out an agreement between itself and between the Government and Air Canada. In a further complication, the Pearson agreements became the subject of mounting political controversy during the fall, especially after the Writs of Election were issued on 8 September 1993.

The heightened role of the central agencies was another noteworthy feature of this phase. The Privy Council Office performed an oversight role, and also acted as a facilitator at certain key points. Reflecting the function of the Treasury Board, Treasury Board Secretariat officials subjected emerging arrangements to the kind of scrutiny that they would subsequently receive from the Ministers on the Treasury Board.

1. The Cast of Characters - An Introduction to the Process

At Paxport, on the day following the 7 December 1992 announcement of a Best Overall Acceptable Proposal, Mr. Hession's role in the Pearson process was redefined so that he became essentially an advisor. His subsequent negotiating responsibilities concentrated on the employee transfer plan and the industrial benefits plan, with his central focus shifting to the development of international project opportunities. Mr. Jack Matthews, who had been

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appointed Chief Executive Officer in September 1992, assumed general responsibility for negotiating the Pearson agreements²⁵².

In the Department, according to then Deputy Minister Huguette Labelle, Mr. Victor Barbeau, recommended that a full-time chief negotiator be appointed because, as Assistant Deputy Minister Airports, he was juggling a number of very active files relating to the management of Canada's airport system. This approach was concurred in by the Minister at that time, the Honourable Jean Corbeil.²⁵³.

Mr. Ranald Quail, then Associate Deputy Minister of Transport, was asked by Mrs. Labelle to serve as chief negotiator, a role he assumed from the beginning of January 1993 until his appointment as Deputy Minister of Public Works on 12 February 1993²⁵⁴. At this point, following consultations with P.C.O. and others, Mrs. Labelle obtained the services of Mr. David Broadbent, who had retired as Deputy Minister of Veterans Affairs the year before. He served as chief negotiator until after formal negotiations had begun.

As work proceeded through the spring of 1993, tensions appear to have arisen between Mr. Broadbent and the Transport Canada Airports Group, which was also being criticized by the developers for what they saw as the slow the pace of negotiations. The result, according to Mrs. Labelle, was that she and Mr. Barbeau, agreed that he should step aside as Assistant Deputy Minister, Airports Group, for a brief interval, in order to avoid becoming a target. Thus, on 27 May 1993, Mr. Barbeau left the Department for a period of approximately five weeks on leave, and was replaced on an acting basis by Mr. Michael Farquhar²⁵⁵.

Delays had made it evident by this time that the negotiations would not be completed by the end of May. As a result, Mrs. Labelle and Mr. Broadbent discussed whether or not he would wish to continue as chief negotiator beyond the original negotiating time-frame. According to Mrs. Labelle, Mr. Broadbent was not enthusiastic. Mr. Bill Rowat, who had an in-depth knowledge of the file was about to be transferred to the Department as Associate Deputy Minister. Therefore, Mr. Broadbent was not invited to renew his contract²⁵⁶. Mr. Broadbent's version of events provided a somewhat different account. He told us that he had had to manage the file "with one hand tied behind my back," because of limited support from

252 See *Proceedings*, 9:40.

253 See *Proceedings*, 8:8.

254 See *Proceedings*, 15:46.

255 See *Proceedings*, 8:9-10.

256 See *Proceedings*, 8:44.

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departmental officials; he had also felt blind-sided by unanticipated developments, to be detailed below, during the negotiations²⁵⁷.

As a result, on 15 June 1993, Mr. Bill Rowat assumed duties as chief negotiator, immediately following his appointment as Associate Deputy Minister of Transport.

The final change took place at the deputy-ministerial level, in the context of a shuffle of some twenty-one deputies on 25 June 1993, timed to coincide with a major government reorganization and the appointment of a new Cabinet by Prime Minister Kim Campbell. Mrs. Jocelyne Bourgon became Deputy Minister of Transport, after four and a half months as President of the Canadian International Development Agency. According to Mr. Glen Shortliffe, who as Clerk of Privy Council at that time would have exercised primary responsibility for senior personnel matters, he did not receive direction to make this reciprocal transfer, nor was he subject to any pressure to do so²⁵⁸.

There are changes of personnel in any process as lengthy as that which produced the Pearson agreements. Our central concern was to ensure that the changes above were not for reasons that would raise questions about the integrity of the process. We were assured by those involved that none of the departures reflected any public official's unwillingness to continue to be assigned to the Pearson terminal redevelopment project, or actual deficiency in the performance of duties related to it. With the exception of Mr. Barbeau's leave, which involved the temporary removal of a public servant described by his colleagues as extremely dedicated and competent in the performance of all his duties, the departures reflect the pattern of career changes and personnel replacements normal in any situation involving the same number of people and duration as the Pearson process.

2. Resolving the Pre-Negotiation Issues

A) The Government and Paxport

On 7 December 1992, the date of the public announcement of a Best Overall Acceptable Proposal, a letter signed by Mr. Victor Barbeau, Assistant Deputy Minister, Airports officially advised Paxport that its proposal had been selected. The same letter cited provisions in the Paxport proposal described as unacceptable or partly unacceptable, which would have to be addressed in negotiations. We were advised that a list of some fifty-five items was ultimately prepared within the department in advance of negotiations²⁵⁹.

257 See *Proceedings*, 9:98.

258 See *Proceedings*, 24:88.

259 See *Proceedings*, 15:58.

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The letter also specified two issues that would have to be addressed before formal negotiations could begin:

Moreover, the changing financial realities within the airline industry are impressing the government with a number of additional concerns, particularly the financeability of your proposal.

We are prepared to enter into negotiations to reach an agreement within the framework of the Request For Proposals provided that

- 1) certain changes required by the Minister are made to your Proposal in order to accommodate the government's concerns; and
- 2) you demonstrate to the satisfaction of the government by February 15, 1993 that your proposal, in the circumstances, is financeable²⁶⁰.

Confirmation of Paxport's acceptance of the various requirements set out in the letter, including the need to adapt to the reality that the recession was reducing the ability of the airlines to accept higher costs and the need to demonstrate financeability, was requested by 10 December 1992 and appears to have been received.

According to Mr. John Desmarais, Senior Advisor to the Assistant Deputy Minister, Airports Group, who had participated in the entire Pearson process, the reference to changing conditions within the airline industry reflected the possibility seen at the time as quite likely that Air Canada and Canadian Airlines might merge. It essentially told Paxport that it must consult with the airlines to determine what entity might ultimately be using the terminals, and its requirements²⁶¹.

Turning to the request for a demonstration that the proposal was financeable, the Request For Proposals had alerted proponents that proof of financeability would be required following the selection of a best overall acceptable proposal. This was portrayed by several officials as a normal step at the post-evaluation stage²⁶². According to Mr. Keith Jolliffe (Financial Advisor, Aviation Group, Transport Canada), who participated in both the evaluation process and subsequent negotiations, the need for proof of financeability reflected, in part, the nature of the evaluation process, which focused on financial projections developed within the two proposals. At the conclusion of the evaluation, the winning proponent had to undergo real-world financial tests based on the actual financial condition of its partners, and the demonstrated willingness of lenders to provide the required financing²⁶³.

260 See *Proceedings*, 11:75.

261 See *Proceedings*, 11:84.

262 See *Proceedings*, 6:80-81.

263 See *Proceedings*, 11:85.

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What would constitute a demonstration of financeability (beyond what was provided in the proposal) was, according to Mr. Hession, first discussed at a meeting between himself and Mr. Barbeau in Ottawa on 15 December 1992²⁶⁴. Mr. Hession had been told that departmental officials would not be defining what was required; any relevant information should be submitted whereupon a financial advisor engaged by the department would determine whether or not it was adequate. This account appears to be confirmed by a follow-up letter of 22 December 1992, from Mr. Barbeau to Mr. Hession, which states that "...it is not our intention to define for you what would constitute evidence of financeability which is satisfactory to the government."²⁶⁵

Mr. Hession was sharply critical of what he portrayed as a needless delay of some two months created by Transport Canada's approach to financeability discussions. This involved retaining the consulting firm of Deloitte & Touche in January 1993 to assess the financeability of Paxport's proposal²⁶⁶.

By late January 1993, a negotiating team had been assembled and an initial meeting held with Paxport officials to review issues, particularly Paxport's position on the financeability question. According to Mr. Quail, the central question was whether or not there had been significant changes in the requirements of potential lenders, or in their willingness to lend the needed amounts to Paxport, since the formulation of Paxport's proposal²⁶⁷. As well, Paxport's original financial information reflected elements of the proposal that the government was not prepared to accept, and the implications of this for the financeability of the proposal had to be addressed.

Further discussion of financeability issues, among others, took place in early February, this time in the presence of representatives of Deloitte & Touche and also of Cassels Brock, which had been engaged to provide legal advice through the negotiation process. On 9 February 1993, Mr. Jack Matthews requested that the 15 February deadline for proof be extended to 1 March; this was done in a letter dated 12 February, the date on which Mr. Quail moved to the Department of Public Works²⁶⁸.

During this period, the role of Mr. Paul Stehelin of Deloitte & Touche steadily increased in importance. Initially, he gathered the required information and provided advice on the financeability of the proponent. The account of his performance of these duties

264 See *Proceedings*, 8:78.

265 Victor Barbeau to Ray Hession, December 22, 1992, Committee document LA 000095.

266 See *Proceedings*, 15:47.

267 See *Proceedings*, 15:60.

268 See *Proceedings*, 15:47.

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indicates that he had considerable latitude in formulating financeability requirements and was not simply employing departmentally established standards.

Mr. Stehelin's initial conclusion was that the nature of the transaction precluded the unconditional guarantees envisioned in the Request For Proposals and by departmental officials. The real estate market in Metro Toronto was in serious decline as of early 1993; moreover, even under stronger conditions, no financial institution was likely to provide an unconditional commitment for the \$850 million to be needed over a period of eight to ten years, especially given the widespread concern about the health of the aviation industry. Defining a test of financeability that would both provide an adequate guarantee to the government and reflect real-world realities thus became itself a subject of discussion.

An examination of the availability of financing for staged development, required attention to the availability of financing for the initial stage and the identification of the conditions necessary for lenders to lend at subsequent stages. For example, it was essential in the second phase that traffic would grow in line with projections. Concerns about the world economy and the health of the airline industry thus became relevant.

In addition to formulating standards, Deloitte & Touche gathered data on the financial state of the Paxport partners, thereby determining that \$20 million of the equity committed by the Matthews Group would be funded by Allders, another Paxport partner, under an agreement made in June of 1992. This became important in subsequent discussions because it meant that the failure of Matthews Group would have made Allders, a major tenant as the operator of the duty free concession, the majority shareholder in Paxport. The government's position was that the terminals could not be controlled by a major tenant.

In a letter dated 2 March 1993, Deloitte & Touche provided Transport Canada with its first formal report on the financeability of the Paxport proposal. The report identified a series of concerns, stating that, unless they were resolved, "we cannot provide assurance to the Crown that this project can be financed"²⁶⁹. The reaction of Paxport to this assessment appears to have been extremely hostile (a departmental memorandum refers to "outrage" and charges of bureaucratic stalling)²⁷⁰.

As of 15 March 1993, when Mr. David Broadbent assumed the role of chief negotiator, the financeability of the proposal thus remained very much in contention. In Broadbent's view, four central questions had to be answered. They were: whether the capitalization of Paxport would be judged sufficient by potential lenders; whether the Paxport partners would actually contribute the amounts they had agreed to; whether the Matthews Group was financially sound and the issues raised by its reliance on a loan from

269 Paul Stehelin to Huguette Labelle, Committee document LA 00196, p. 6.

270 See *Proceedings*, 13:27.

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Allders could be resolved; and, finally, whether Air Canada would be capable of paying the higher rentals envisioned in the Paxport proposal²⁷¹. These issues continued to be discussed with Paxport during March, but with little apparent progress.

It is noteworthy that, during the initial months of discussions with Paxport, government officials carefully maintained that, in December 1992, the Claridge proposal had also been found acceptable. While it was not actively discussed, it was left on the table as a fall-back in the event that discussions with Paxport should not be productive. Government officials believed that this strategy had the additional advantage of giving the government more leverage in its attempts to resolve the pre-negotiation issues with Paxport. As well, it responded to concerns raised by Treasury Board officials that to shift to formal negotiations with Paxport before resolution of the financeability issue would violate the process set out in the Request For Proposals, and could have prompted legal action from Claridge.

B) The Government's Second Track

According to our witnesses, the possibility of some form of cooperative venture between Paxport and ATDG, or the Claridge interests, appears to have arisen as far back as November 1992. A memorandum dated 16 November 1992, from Clerk of the Privy Council Glen Shortliffe to Prime Minister Mulroney, alludes to this possibility with a statement that, at that juncture, there appeared to be few incentives favouring the venture. In his testimony, Mr. Shortliffe stated that the comment was a response to an inquiry from the Prime Minister, who had apparently been approached on the issue by Mr. Charles Bronfman at a social gathering at which Bronfman raised the idea²⁷².

The possibility of a merger was, however, given further attention by government officials. According to Mr. Shortliffe, the operational benefits of having a single operator, rather than concerns about the financial capacity of Paxport, caught the attention of government officials²⁷³. An unsigned government paper, which appears to relate to this period and which we received during our final hearings, explores options such as combining various elements of the Paxport and Claridge proposals, or having the two firms jointly develop a new proposal.

Mr. Hession indicated that he was contacted at Paxport by a senior Transport Canada official, during the days immediately following the announcement of a Best Overall Acceptable Proposal. The official suggested that Mr. Hession explore the possible synergies which could be achieved through cooperation with Claridge in the management of all three Pearson terminals. In a letter provided to us subsequent to his appearance, Mr. Hession

271 See *Proceedings*, 9:89.

272 See *Proceedings*, 24:65.

273 See *Proceedings*, 9:44 and 9:48.

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identified the senior official as then Deputy Minister of Transport Huguette Labelle. He also indicated that her telephone call prompted him immediately to suggest to Don Matthews that he call Mr. Bronfman, not to raise the issue but to provide Mr. Bronfman with an opportunity to raise it.

According to Mr. Coughlin of Claridge Properties, Mr. Bronfman raised the possibility of a partnership with Mr. Matthews shortly after the 7 December announcement, when Mr. Matthews had called to commend Claridge's competitive effort²⁷⁴. Mr. Coughlin advised us that in making this proposal, Claridge was following a contingency plan reflecting the belief that Paxport had the capacity to meet whatever financial tests the government was about to apply. When these tests were met, any chance for participation by Claridge in Terminals 1 and 2 would be lost.

The fundamental perception which had originally led to the formation of Claridge and the submission of a proposal was the view that an interest in the operation of Terminals 1 and 2 was necessary in order to safeguard the profitability of Terminal 3. This objective had become steadily more important as the recession affected the finances of Canadian Airlines. As the major tenant of Terminal 3, its failure would have resulted in both the immediate loss of its rent and in a major diversion of passengers to airlines using the other terminals, thus compounding the financial consequences for the owners of Terminal 3²⁷⁵. With this objective still in mind, Claridge made what Mr. Coughlin described as the "business decision" to sound out Paxport on the possibility of a partnership.

Mr. Matthews' account of events is consistent with that of Mr. Coughlin. According to Mr. Matthews, the initial conversation with Mr. Bronfman, on 9 December 1992, focused on the need for the two companies to cooperate during the redevelopment process. At a 16 December meeting in Toronto the parties agreed to pursue the issue, leading to further discussions about the possibility of a merger and, in turn, to the signing, on 14 January 1993, of a binding agreement to negotiate²⁷⁶. From Paxport's point of view, the attractions of the merger were similar to those perceived by Claridge: it would give Paxport part ownership of Terminal 3, permit that terminal to be used in the course of the construction program for savings of some \$75 million, and achieve operational savings of some \$4 million per year on an ongoing basis²⁷⁷.

Under questioning, both Mr. Coughlin and Mr. Matthews stated very definitely that there had been no communications with Paxport about a possible joint venture before 7

274 See *Proceedings*, 17:12 and 17:20.

275 See *Proceedings*, 17:19.

276 See *Proceedings*, 18:40.

277 See *Proceedings*, 18:81.

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December 1992, nor had there been any pressure from the Prime Minister's Office or the Privy Council Office in favour of such a possibility²⁷⁸.

The account of events provided by departmental officials was broadly consistent with that of the developers. According to Mr. Quail, to his knowledge the possibility of some form of Paxport/Claridge merger only surfaced within the Department of Transport in late December 1992. It was not until mid-January, however, that tangible evidence became available.

On the weekend of 16-17 January, Mr. Quail received a telephone call from Mrs. Labelle requesting his attendance at a meeting, on Monday 18 January, with representatives of both Paxport and Claridge. At this meeting, departmental officials were advised of the 14 January 1993 letter of agreement, in which the two firms jointly committed themselves to negotiations to lead to the 50/50 joint venture between Paxport and Claridge initially known as Mergeco. It was agreed that the possibility of such a venture would be kept confidential until the two parties had fulfilled the commitments undertaken in their agreement and the venture became a reality, and that in the meantime the government's discussions with Paxport could continue²⁷⁹.

This development had an immediate impact on the course of discussions. First of all, it raised fundamental questions in the minds of government negotiators. At the 18 January meeting, for example, Mr. Quail requested information identifying the lenders for the joint arrangement, and sought agreement that the Paxport proposal would be the one discussed with the joint venture²⁸⁰. It was made clear that the government would find unacceptable any substantial deviations from the framework of the proposal, which had been evaluated as best overall acceptable²⁸¹. As well, notes made following the 18 January meeting, include questions such as "Is deal wide open? Is process shot to pieces?". As well, it was recognized that the issue of financeability could now be addressed on a new basis.²⁸²

At this point, as well, Mr. Quail sought legal advice on the effects of a merger on the negotiation process; however, because merger arrangements were at such an early stage, definitive advice was not available before his transfer²⁸³. He did, however, receive advice from Mr. Chern Heed, Manager of Pearson Airport and a member of the negotiating team, which apparently reflected discussions with other team members. The advisory

278 See *Proceedings*, 18:79.

279 See *Proceedings*, 15:93.

280 See *Proceedings*, 15:94.

281 See *Proceedings*, 15:95.

282 See *Proceedings*, 15:68-69.

283 See *Proceedings*, 15:70.

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memorandum states that in the absence of evidence to the contrary, the merger should be seen simply as a corporate restructuring:

The fact that the selected proponent is selling 50% of its rights as "the proponent with the best overall acceptable proposal" (whatever those rights may be) is not seen as a violation of the process, unless there was some evidence that there was collusion earlier in the proposal process and we have no reason to suspect there was²⁸⁴.

The final weeks of January 1993 brought some clarification about the nature of the joint venture envisioned by Claridge and Paxport. Departmental officials spent the period up to early February identifying potential issues and concerns²⁸⁵.

According to Mr. Broadbent, who assumed the role of chief negotiator on 15 February, the obvious strategy of the Crown was, first of all, to procure the benefits of the Paxport proposal. (which involved a superior financial return to the Crown, in addition to a more attractive development plan than that proposed by Claridge), backed by the financial strength of Claridge's owners, the Bronfmans²⁸⁶. As he said, "...there wasn't any question in my mind of producing a deal at any cost. Any deal that was produced was going to be a good deal or there'd be no deal"²⁸⁷. The second part of the Crown strategy would be to respond to the financial situation of the airlines by structuring the agreements so that they could avoid heavy up-front charges to the airlines²⁸⁸.

The Broadbent team aimed to separate the issues as much as possible and run discussions on parallel tracks; in this way, issues such as personnel matters, industrial benefits and even the preparation of draft agreements could be taken to an advanced stage informally, while formal negotiations awaited the resolution of "deal breaker" problems such as the financeability issue²⁸⁹.

Mr. Broadbent's instructions, apparently expressed by both Mrs. Labelle and Mr. Shortliffe, were to move the process forward rapidly, so that negotiations could be brought as close to a conclusion as possible by the end of May 1993²⁹⁰. Mr. Broadbent interpreted this to mean that the government of the day, not surprisingly, wanted to finish outstanding

284 See *Proceedings*, 15:63-64.

285 See *Proceedings*, 15:47.

286 See *Proceedings*, 9:89.

287 See *Proceedings*, 9:90.

288 See *Proceedings*, 9:110.

289 See *Proceedings*, 9:91-92.

290 See *Proceedings*, 9:102.

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business before the leadership convention in June. The Prime Minister had, apparently, communicated "live interest" in the Pearson file to Mr. Shortliffe. According to Mr. Broadbent: "...whatever pressure, if there was any, came from that direction and stopped with Glen Shortliffe. He was the buffer. He absorbed it. There was no pressure on me"²⁹¹.

Of special interest in the early stages of Mergeco was whether the joint venture and attendant changes to the proposal would represent an unacceptable departure from the framework deal selected as the best overall acceptable proposal. This issue was raised by Mr. Broadbent with Deputy Minister Huguette Labelle and subsequently discussed with Privy Council Office and Treasury Board officials who, according to Mr. Broadbent, specifically reviewed it and gave it a clean bill of health²⁹².

During April and May, work proceeded on an interrelated set of issues, many of which had implications for discussions on financeability. For example, the government's wish to minimize the short-term cost increases for airlines directed attention to arrangements whereby phases of development were conditional upon the attainment of passenger volume thresholds that would make the phase more affordable. The government's desire to defer cost increases to the airlines also led to a short-term deferral of rental payments to the Crown, along with the absorption by developers of some of the costs during the initial period²⁹³.

During this period, March to June 1993, Mr. Stehelin (the Deloitte & Touche consultant on financeability issues) worked full-time on the Pearson file. The formation of the Claridge-Paxport joint venture had one immediate benefit: it removed the hitherto unresolved concern that failure of the Matthews Group might place the project in the hands of a major tenant. Paxport would hold only a 50% share of the joint venture, Thus even if the Matthews Group share were to be acquired by Allders (because of a default on the loan to Matthews) Allders would not acquire control of the project²⁹⁴.

Other issues relating to the determination of financeability continued to evolve. The need to provide satisfactory guarantees to the government that the required financing would be in place, remained under intense discussion through April and May, even though the emergence of the joint venture, backed by Bronfman interests, substantially reduced concern. Such continuing discussion was necessary because of the relation between financeability and other aspects of the evolving structure of the deal.

According to Mr. Stehelin and others, an issue that appeared highly intractable at this time was the need for endorsement from Air Canada which, as the major tenant of Terminal

291 See *Proceedings*, 9:103.

292 See *Proceedings*, 9:95.

293 See *Proceedings*, 10:20, 10:26 and 10:29.

294 See *Proceedings*, 13:25.

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2, would be directly affected by redevelopment and any attendant costs²⁹⁵. This issue warrants separate attention.

C) The "Air Canada Sandwich"

The Request For Proposals had made proponents responsible for assuring Air Canada that it would enjoy the benefits of its recent investments in Terminal 2 over a normal amortization period, and for negotiating specific arrangements²⁹⁶. As a result, discussions between Paxport and Air Canada had been ongoing, and the Paxport proposal made development work conditional on the signature of a new lease with Air Canada. Air Canada was thus in a position to make or break the deal.

During the early months of 1993, the Air Canada-Paxport discussions appear to have made little progress²⁹⁷. Indeed, during the 3 March 1993 meeting between Paxport and Department of Transport officials, including Mrs. Labelle, Paxport argued that the absence of formal negotiations was undermining Paxport's credibility (and negotiating position) with Air Canada, to the point where the airline was refusing to negotiate seriously²⁹⁸.

When Mr. Broadbent assumed the role of chief negotiator, in mid-March, Mr. Matthews expressed to him the same concerns. Mr. Broadbent recalled being told that Air Canada was behaving as if it had a veto over the deal, and that Paxport was going to need help in dealing with this issue²⁹⁹.

Also raised at the 3 March meeting was the fact that Air Canada, in its discussions with Paxport, was claiming that its lease agreement with the government extended for sixty years, rather than until the 1997 date of the existing lease. Mrs. Labelle advised us that she had been aware, at this time, of Air Canada's position on the "Guiding Principles" document³⁰⁰ for at least a year; however, until the spring of 1993, she had not known of the decision to omit this document from the collection provided to proponents after the issue of the Request For Proposals. This matter appears to have prompted discussion within the department. Minutes of an 18 March meeting held for the primary purpose of introducing Mr. Broadbent to the negotiating team allude to the issue of possible long term commitments³⁰¹.

295 See *Proceedings*, 13:41.

296 See *Proceedings*, 8:50.

297 See *Proceedings*, 13:39.

298 See *Proceedings*, 13:46.

299 See *Proceedings*, 9:90.

300 See Chapter III.

301 Committee document LA 00007.

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According to Mr. Broadbent, several weeks after he had assumed responsibility for the negotiations, he was advised by the Department of Justice official providing legal advice to the negotiating team, of the existence of the 1989 "Guiding Principles" document. As has been seen, this document provided for a twenty-year renewal of the Air Canada lease (otherwise terminating in 1997) and two ten-year extensions. Mr. Broadbent also learned that this document had not been referenced in the Request For Proposals or included in the documents room established for proponents, to whom the Government was legally obliged to disclose it. This development caused great concern, according to Mr. Broadbent, and resulted in significant delays. Aside from introducing a new circumstance with implications for a number of items including the financeability issue, it could have allowed the proponent to argue that the Request For Proposals had been changed retroactively and thereby have rendered redundant everything achieved up to that point³⁰².

As has been seen in an earlier chapter, there had been some apparent uncertainty within the Department about the precise status Air Canada accorded the "Guiding Principles" document, with the prevailing view of officials being that it was no longer legally binding. The Department immediately prepared an estoppel certificate for signature by Air Canada; this would either commit the airline to the existing lease or prompt a clear affirmation of the "Guiding Principles".

The preparation of the estoppel certificate added a further complication, however. In reviewing the lease, Department of Transport officials found that payments required under amendments to the lease had not been collected, and the airline owed the Crown some \$8 million. Broadbent advised financial and audit officials within the department. He expressed his surprise to the Committee that this omission did not seem to have been viewed with particular concern³⁰³.

In response to inquiries from Mrs. Labelle, Air Canada apparently continued to affirm the validity of the "Guiding Principles" document. Thus Transport Canada had to inform the developers of the existence of this document, with its potentially significant implications for the terms on which they would be able to deal with Air Canada. In mid-June of 1993, Mrs. Labelle wrote to both Paxport and Claridge, referring to "an issue which I thought had been addressed, but which may not have been resolved"³⁰⁴. After outlining the negotiation issues that could be affected, the letter stated the Department's view that a capital adjustment payment of \$36 million to Air Canada included in Paxport's proposal would be in lieu of any entitlements created by the "Guiding Principles", and asserted that it would be Mergeco's responsibility to "come to a complete agreement with Air Canada."

302 See *Proceedings*, 9:97-98.

303 See *Proceedings*, 9:99.

304 Huguette Labelle to Jack Matthews, June 9, 1992, Committee document, LA 001553.

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The developers' reaction to this information was predictably hostile, as described by Mr. Coughlin, on behalf of Claridge:

From our perspective, this was devastating. Our entire business plan was based upon being able to negotiate a new Air Canada lease in 1997. This was why we accepted a three year partial rent deferral and why we agreed to undertake a \$350 million development program with no conditions³⁰⁵.

Mr. Hession expressed the Paxport perspective in similar terms; he described the situation as "a shocker," whereby during preceding months Paxport had been required to reach an accommodation with Air Canada in ignorance of an arrangement giving the airline a basis for "high expectations and an effective veto over the negotiations"³⁰⁶.

These developments combined created what became known within the Department as the "Air Canada sandwich." From mid-June onward, the developers were caught in the middle of a dispute between Air Canada and the Department over the status of the Guiding Principles. Depending on which side prevailed, Air Canada was in a position either to strongly influence the initial stages of the agreement by refusing to alter the terms of a lease that would not lapse until 1997, or to make or break the deal as a result of lease entitlements extending for some 40 years.

The lack of progress in discussions between Mergeco and Air Canada, together with these new complexities, prompted Mrs. Labelle, in conjunction with the negotiating team to decide in mid-June that the Department would have to take a more interventionist approach. The two parties were thus invited to work together with the chief negotiator to resolve their issues.

D) Finalizing the Deal

Upon assuming the role of chief negotiator following 15 June 1993, Mr. Rowat found the main elements of the eventual agreement either resolved or close to resolution³⁰⁷. Among issues well advanced, if not entirely concluded, were the definition of the respective responsibilities of the government and the developers for environmental matters, and the clauses providing for the transfer of personnel. Tenant equity and passenger facility charge issues had also been addressed³⁰⁸.

305 See *Proceedings*, 17:14.

306 See *Proceedings*, 8:78 and 9:29.

307 See *Proceedings*, 10:57.

308 See *Proceedings*, 10:77.

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Several issues required more substantial work. Among these were the future of Terminal 1 -- how long it would remain open and how the costs of its continued operation would be shared³⁰⁹. As well, the government had rejected Paxport's original demand for a guarantee that the government would not do anything at other airports that would reduce traffic at Pearson below an annual thirty-nine million passengers. Protection involving a lower threshold and altered conditions remained under negotiation.

Negotiators for the two sides had agreed on an arrangement under which the developers would, during the first three years of the agreement, defer payment to the Crown of \$11 million per year in rent in exchange for spending \$96 million on start-up phase development but without increasing charges to the airlines during the first two years. Certain terms and conditions of this arrangement remained to be agreed, however. Furthermore, according to Rowat, as of mid-June, the settling of arrangements with Air Canada remained the most difficult of the outstanding issues³¹⁰.

As Mr. Rowat assumed the role of chief negotiator, the selection of a new leader by the governing Progressive Conservative Party raised the prospect of changes in ministerial and deputy-ministerial personnel, as well as government policy and priorities. This caused the developer to press for an official statement or memorandum of understanding that would solidify, as far as possible, the results achieved thus far in negotiations and commit the government to completing the process. While departmental officials successfully resisted a legally binding commitment, the two sides did jointly sign a letter, dated 18 June 1993, which provided a mutually agreed statement of the status of negotiations and affirmed the commitment of both parties to resolve remaining issues and finalize project agreements by 15 July if possible. The letter specifically stated that it did not constitute a legally binding agreement³¹¹.

At this time, as well, the multi-track negotiating process established by Mr. Broadbent was replaced with a process of negotiations at a single table³¹². This change reflected the relatively advanced state of negotiations, and the evolving dynamics which this would imply. Issues that could be resolved separately had been largely resolved by this point. An overall agreement would increasingly require trade-offs among the various outstanding items.

To map out systematically the strategy to govern these trade-offs, and to ensure that officials of the Privy Council Office and Treasury Board Secretariat were on-side with the emerging agreement, Mr. Rowat initiated the preparation of a detailed negotiating "black

309 See *Proceedings*, 12:40.

310 See *Proceedings*, 10:57.

311 See *Proceedings*, 10:64-65.

312 See *Proceedings*, 10:67 and 10:69.

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book." Drafts of this document were circulated to the Minister of Transport and departmental and central agency officials, and were finalized on the basis of a series of meetings during the second half of June³¹³.

The black book included a statement of overall negotiating objectives, based on the Request For Proposals. During his appearance before us, Mr. Rowat captured these objectives in three principles: (1) that the agreement leave the government no worse off financially than any of the alternatives, such as continuing to operate the terminal itself; (2) that the airport remain competitive nationally and internationally, with respect to its cost per passenger among other things; and (3) that airlines and passengers not be subjected to onerous charges as a result of terminal development³¹⁴.

The negotiating book also contained status reports and negotiating positions on remaining issues, including the Air Canada issue. The government's negotiating position appears to have been to maintain that "while no disclosure was made of the Guiding Principles in the Data Room," the Request For Proposals had adequately dealt with the issue by requiring proponents to respect the existing Air Canada lease and negotiate the terms and conditions of development with the airline. Government negotiators would focus on pressing Air Canada to conclude an agreement with Mergeco, using as leverage the fact that, in the absence of such agreement, the government on its own could conclude agreements with Mergeco that would result in cost increases to Air Canada after the lapse of its existing lease. This approach reflected Mr. Rowat's view that the status of the Guiding Principles document was not as clear-cut as some, including his predecessor, had thought. Air Canada had been provided with drafts of the relevant section of the Request For Proposals before its release and had raised no objection to the absence of a reference to the 1989 document³¹⁵.

Mr. Rowat's view was that Air Canada had three basic objectives. It wanted to be compensated for the undepreciated balance of some \$65 million invested in Terminal 2 in recent years. The airline also wanted to avoid cost increases during the period before 1997; its financial condition was fragile, and reassuring traffic forecasts developed by Transport Canada were regarded as overly optimistic. As well, while recognizing the need for development, Air Canada wanted to ensure that cost increases after 1997 would allow the per passenger costs of Terminals 1 and 2 to remain competitive with those for airlines in other terminals³¹⁶.

On 28 June 1993, reflecting the more interventionist approach to Air Canada/Mergeco negotiations adopted by the Department in mid-June, Mr. Rowat attended

313 See *Proceedings*, 10:67 and 10:69.

314 See *Proceedings*, 10:88.

315 See *Proceedings*, 11:28.

316 See *Proceedings*, 11:29.

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a meeting between the two parties in order to observe their direct attempts to reach agreement. He also met separately with each of the parties. These meetings confirmed his assessment of Air Canada's concerns, and his view that the airline was using 1989 Guiding Principles document primarily as a source of negotiating leverage³¹⁷. According to Mr. Rowat, he communicated his assessment of the situation to Minister Corbeil and sought direction³¹⁸.

During the ensuing two weeks, at Minister Corbeil's direction, Mr. Rowat worked with Air Canada and Mergeco to develop a possible solution, which was taken back to Minister Corbeil³¹⁹. Minister Corbeil's comments would suggest that the general approach outlined in the negotiating books ("...it's not our baby, its your baby,") continued to be followed, despite Mr. Rowat's involvement as a facilitator. During his appearance, before the Committee, the Minister focused on the result, which he described as fully meeting government objectives³²⁰.

According to Mr. Rowat's more detailed comments, the mid-July agreement between Mergeco and Air Canada made possible a development agreement that left the government in a better position, with respect to returns to the Crown, than the next best alternative, the base case, or construction by the Crown option, of which the department had prepared an analysis³²¹. The results of the analysis were subsequently made available to Mr. Nixon in a 4 November 1993 memorandum, which stated the following "bottom line" conclusion:

In order for the Crown Construct Option to generate revenues equivalent to the Private Sector Lease, a 10% (per annum) real growth would have to be assumed. Under government management in the past growth in revenues has been at or below inflation.

Since growth at the rate of inflation is equivalent to no "real" growth, the base case analysis clearly favoured the private sector lease option, from the perspective of revenues to the Crown.

The development of a base case analysis also involved comparing estimates of the net present value to the Crown of the terminals under Crown Construct and private sector lease scenarios. These comparisons clearly supported Mr. Rowat's assessment. For example, terminal revenue assumptions which would generate a Crown Construct value of \$227

317 See *Proceedings*, 10:74.

318 See *Proceedings*, 10:74 and 11:29.

319 See *Proceedings*, 12:4-5.

320 See *Proceedings*, 21:33.

321 See *Proceedings*, 10:77 and 12:8.

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million result in a private sector lease value of \$555 million, while assumptions generating a Crown Construct value of \$595 million raise the value to the Crown of the private sector lease option to \$843 million.

According to Mr. Rowat, the agreement also reduced the overall rate of return to Pearson Development Corporation (the name the Mergeco joint venture had by this time assumed) from what had originally been proposed. Pearson Development Corporation (PDC) reduced the capitalization rate to the airlines, as well as agreeing to provide ten per cent of its net concession revenues to the airlines using Terminals 1 and 2. **These were seen as major concessions by Mr. Rowat, reflecting that everybody had "put a bit of water in their wine in order to conclude the final agreement"**³²².

For its part, the government had agreed to changes to its ground rent, notably the deferral of \$11 million per annum in rental payments during each of the first three years. This assisted the developers in offering an attractive package to Air Canada³²³. Still to be resolved was the term over which the developers would repay the deferred rent. The developers had initially sought to have this term extended over the residual of the agreement, which would have been upwards of fifty years; however, a mid-May meeting of deputy ministers rejected this option lest it create the impression of a continuing government subsidy. The government negotiators thus insisted upon a ten-year repayment period, with payments to be made at a rate of interest of prime plus 2.5%³²⁴.

By July 1993, negotiations had apparently progressed to the point where their completion and a closing date for the deal could be envisioned. Mr. John Desmarais, of the negotiating team, and Mr. Peter Coughlin agreed on 7 October 1993 as a reference point for ensuing activities³²⁵. Mr. Coughlin has said that a date was identified to prevent the lawyers from protracting negotiations indefinitely³²⁶.

It was now possible for Deloitte & Touche to report formally its assessment of the financial elements of the deal. The report took the form of a letter dated 17 August 1993, from Mr. Paul Stehelin, President, Deloitte & Touche, to Mr. Rowat. Its findings reflected the somewhat broadened mandate under which the firm had been working since its March report on the financeability of the Paxport proposal.

322 See *Proceedings*, 10:77.

323 See *Proceedings*, 11:30.

324 See *Proceedings*, 12:7.

325 See *Proceedings*, 12:42.

326 See *Proceedings*, 17:78.

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A favourable assessment is given of the financeability of the PDC proposal, based on financial projections developed by PDC in late July, taking into account arrangements established during negotiations. While approving the presence of Claridge and Terminal 3, the report cautions that the long-term nature of the project will make lenders base their willingness to finance later phases of the project on the performance of the developers during the earlier phases, especially the first four years³²⁷.

Several other issues were also addressed. Noting that the transaction had changed substantially since the Price Waterhouse July 1992 estimate of commercial opportunity, Deloitte & Touche provided a new estimate. The net present value of the ground lease was placed at between \$800 million and \$900 million³²⁸.

The rate of return to the developer was estimated at 14%. This falls in the middle of the 12% to 16% range of after-tax rates of return found to be reasonable given the nature of the project, although the difficulty of identifying an appropriate basis of comparison is noted³²⁹.

It was also stated that a number of non-quantitative considerations should qualify any judgment about the rate of return: returns to the developer would have been virtually nil during the first 10 years, would not have become substantial until after twenty years, and would have been subject to erosion by tax increases; later phase investments by the developers, needed to maintain the terminals to world class standards, were not included in the developers' financial projections; and special risks associated with non-airline revenues, and with the possibility that slower than anticipated economic recovery might delay construction and increase costs. Furthermore, unlike a utility, Pearson Development Corporation would not have been able to pass all cost increases on to consumers³³⁰.

E) The Central Agencies

With the agreement broadly finalized and an independent assessment of its financial elements in place, the package was ready to go to Treasury Board for final scrutiny by Treasury Board Ministers. The decisive role played by Treasury Board during this final phase is the culmination of the gradual shift towards greater involvement by central agency officials that had been apparent since before the commencement of formal negotiations. This shift reflects the underlying reality that, while ministers and their officials develop initiatives (normally on the basis of cabinet agreement), the government, or ministers collectively, will be held accountable for these and must ultimately decide whether or not to proceed with

327 Report from Deloitte & Touche by Paul Stehelin, Committee document LA 002492, p. 1-3.

328 *Ibid.*, p. 6.

329 *Ibid.*, p. 6-8.

330 *Ibid.*, p. 7.

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them. The role of central agency officials during the discussion/negotiation phase of the process was essentially to ensure that potential concerns of ministers outside the Department would be addressed so that ratification by Treasury Board and Cabinet could proceed smoothly.

The importance the government ascribed to the Pearson Airport redevelopment project was apparent, during the period beginning in November 1992, in exchanges of memoranda and notes between the Prime Minister and Mr. Shortliffe, then Clerk of the Privy Council, which we have reviewed. According to Mr. Shortliffe, the government viewed the Pearson project as a priority item, which it wanted completed before it left office, and the Prime Minister maintained a keen interest in the file³³¹. The Clerk of the Privy Council's role in keeping the Prime Minister apprised of developments required, in turn, the relatively close involvement of Privy Council Office officials. Meetings including officials from the Treasury Board, as well as Privy Council Office, took place on a weekly basis throughout much of this period³³². In many cases these meetings were actually convened by the Privy Council Office at the request or on behalf of the Deputy Minister of Transport³³³.

As has been seen, in addition to monitoring developments, the Clerk of the Privy Council operated from time to time as a key advisor and/or facilitator. For example, with respect to changes of personnel, the advice of the Clerk appears to have been significant in decisions of the Deputy Minister of Transport, Mrs. Labelle, and the Privy Council's provision of Mr. Rowat to replace Mr. Broadbent solved what could have been a difficult problem towards the end of the negotiations. A further example was suggested by Mr. Shortliffe in relation to the formation of the joint venture initially named Mergeco. Mr. Shortliffe and other Privy Council Officials, during the spring of 1993, came to the view that the success of Paxport and ATDG's attempts to form a joint venture was critical to viability of the redevelopment project; accordingly, they worked to encourage that development³³⁴.

Treasury Board officials at these and related meetings behaved in a more adversarial way, in keeping with the internal challenge role played by the ministers on the Treasury Board. Mr. Mel Cappe, now Deputy Minister, Environment Canada, was Deputy Secretary of the Program Branch, Treasury Board Secretariat (TBS) during this period and gave us the following succinct description of the contribution of TBS officials:

They raise issues and questions for ministers and officials to ensure that they're taken into account in the decision-making process. Their objective is to ensure that all the right questions have been asked and that ministers have

331 See *Proceedings*, 24:68 and 24:107.

332 See *Proceedings*, 24:80.

333 See *Proceedings*, 10:58.

334 See *Proceedings*, 24:78.

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adequate information with which to come to a judgement on a file. In most departments across the government, the TBS is viewed as a necessary evil³³⁵.

Reflecting upon Treasury Board officials' behaviour with respect to Terminals 1 and 2 redevelopment project, Mr. Cappe's conclusion was: "...I'm satisfied that we did our job"³³⁶. A review of a series of memoranda recording the questions of Treasury Board officials and a discussion of these documents with officials of both Treasury Board Secretariat and the Department, leads us to concur in Mr. Cappe's opinion. As it took shape during the negotiations, the Pearson Airport deal received extremely close scrutiny from Treasury Board officials.

The complexity of the file, the prospect of public controversy, and concerns that the government appeared to be addressing terminal, runway and other individual issues at Pearson without any overall vision led some Treasury Board officials, by March of 1993, to believe that the file was extremely "messy." According to Mr. Cappe, it was generally believed that it would be preferable to pass the whole matter over to a local airport authority³³⁷. At the same time certain Treasury Board officials believed that the process seemed to be somewhat stalled, with the financeability and Air Canada issues unresolved. The probability of further delay, combined with apparent progress towards a viable local airport authority in Toronto, appeared in their view to make the local airport authority route newly feasible, even though no authority had yet been formed³³⁸.

Considerations of cabinet confidence have precluded our access to detailed information about how ministers learned of this challenge to the project and how it influenced deliberations. It seems likely, however, that Treasury Board ministers considering the agreement achieved by mid-August would be receiving advice on any Treasury Board concerns not already overtaken by events. For example, concerns about a stalled process, and unresolved issues of financeability and concurrence on the part of Air Canada, would no longer be immediately relevant as of mid-August, although, as will be seen below, concerns about political controversy and the status of attempts to form a local airport authority would be strongly so. Until at least late July 1993, Treasury Board officials maintained a preference for fast-track negotiations with a local airport authority, although recognizing that such a course might not be possible unless the negotiations with Pearson Development Corporation were to collapse³³⁹.

335 See *Proceedings*, 14:10.

336 See *Proceedings*, 14:11.

337 See *Proceedings*, 14:33.

338 See *Proceedings*, 14:34-35.

339 See *Proceedings*, 14:77.

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Sometime during mid-August, Treasury Board ministers received the formal submission from the Department of Transport detailing the agreement reached with Pearson Development Corporation, along with the analysis developed by Secretariat officials³⁴⁰. Later in August, Treasury Board gave the agreement approval which was forwarded to cabinet. On 27 August 1993, cabinet issued the Orders in Council authorizing the Minister of Transport to enter into lease and development agreements with the Pearson Development Corporation³⁴¹.

Still outstanding at this point were the public announcement of the agreement, the preparation of finalized lease and other contractual documents by the Department of Justice (whose officials would also ensure that no material change had taken place during this phase), the signing of these documents by the appropriate parties, and the closing of the deal.

F) Lobbyists

Following the announcement of a Best Overall Acceptable Proposal, lobbying firms continued to be engaged by both developers. After 5 May 1993, when the Claridge bid was withdrawn, the firms that had worked for the competing consortiums joined together in support of Pearson Development Corporation.

(i) Paxport

As has been seen, the selection of the Paxport proposal as the Best Overall Acceptable Proposal in December of 1992 led directly to continuing discussions between officials of Paxport and the government. This had implications for the Paxport lobbyists, who no longer needed to serve as a communications link between their client and the officials immediately involved in the process.

Mr. Neville, who coordinated the Paxport lobbying effort, provided no specific description of lobbying activities during the discussion/negotiation phase. His claim that it would have been improper to attempt to influence decision-makers once the formal evaluation process was underway may suggest, however, that lobbying during the negotiation period focused on building broader support for the redevelopment project and providing strategic advice to the client³⁴².

Mr. Pascoe, of A.D. Pascoe and Associates, indicated to us that he continued to represent Paxport during this period, under terms of reference which provided for contacts with groups outside the federal government. He did, however, confirm our documentary

340 See *Proceedings*, 14:73.

341 See *Proceedings*, 14:62.

342 See *Proceedings*, 16:18.

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evidence that he also accompanied Mr. Hession to one meeting with federal officials relating to the Terminals 1 and 2 redevelopment project, in January of 1993³⁴³.

(ii) Claridge

As with other phases of the process, our central sources of information about Claridge lobbying activities following the announcement of the Best Overall Acceptable Proposal were Mr. Harry Near and Mr. Bill Fox, who led Earnscliffe Strategy Group's contribution to the Claridge effort.

According to Mr. Near, the chief activity in the period of discussions between the government and Paxport was the monitoring of Paxport's compliance with the government's pre-negotiation requirements³⁴⁴. This reflects the fact that the Claridge proposal had not been withdrawn at this time, and remained available to the government as an alternative, had discussions with Paxport broken down. In addition, Mr. Fox mentioned the preparation of media relations materials and media monitoring³⁴⁵.

During the formation of the joint venture, according to Mr. Near, there was very little for the lobbyists to do. The issue at that time was whether a workable joint venture could be formed. When success appeared likely, Earnscliffe contributed to the preparation of a presentation on the advantages of a joint venture approach, which was used in contacts with officials, editorial boards and other interested parties³⁴⁶. In general, however, the negotiations phase was a fallow period for lobbying; the participants were working directly together behind closed doors, and anyone who needed to know anything was already in the negotiating room³⁴⁷.

Activity increased during August 1993, during preparations for the public announcement of the agreement. According to Mr. Fox communications activity at this juncture was "particularly intense"³⁴⁸. A press release was developed and, beginning at the end of August, quantitative public opinion research was undertaken in the Toronto area to develop an advertising strategy to respond to concerns about the deal³⁴⁹.

343 See *Proceedings*, 16:50.

344 See *Proceedings*, 15:82.

345 See *Proceedings*, 15:82.

346 See *Proceedings*, 15:82-83.

347 See *Proceedings*, 15:113.

348 See *Proceedings*, 15:113.

349 See *Proceedings*, 15:113-114.

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Mr. Herb Metcalfe, of the Capital Hill Group which worked with Earnscliffe for Claridge, provided an overview of activities during the negotiation phase which broadly paralleled that of Mr. Fox and Mr. Near³⁵⁰.

G) The Deal is Announced

On 30 August 1993, having obtained the authorization of Cabinet to proceed with the finalization and signing of its legal documentation, Minister Corbeil officially announced the agreement. The announcement ceremony, which also involved Ministers Lewis, Wilson and Martin, municipal mayors and officials, and the developers, took place in Toronto³⁵¹.

Background information released at the time of the announcement summarized the main points of the six major agreements: the ground lease, option to lease, development agreement, management and operations agreement, employee transfer agreement, and management and services agreement.

The first three of these contained most of the provisions of central public policy interest. The ground lease terms were described, including the initial term of 37 years, with a 20-year renewal option. The government retained an option to buy out the renewal option at market rates, three years before the termination of the initial lease term.

The formula governing rental payments to the government guaranteed a minimum payment of \$28 million during the first year, with provisions for increases based on inflation, passenger volume and gross revenue growth. This figure was contrasted with the \$23.6 million in net revenue then being received by the government from Terminals 1 and 2. It was noted that this rate of return reflected a balance between dollar return considerations and the need to avoid excessive costs to the airlines or charges that would make Pearson uncompetitive with other major hub airports. The major non-quantitative benefit to the government was said to be redevelopment of the terminals without government financing or guarantees.

Also mentioned were the rent deferral provisions of the agreement, under which the government agreed that \$33 million in rental payments due during the initial years would be postponed so that development could go ahead immediately, without short-term cost increases to the airlines. Reimbursement of this money, with interest, would begin in the fifth year of the lease.

The passenger diversion arrangement which the Government and Pearson Development Corporation had ultimately agreed upon was also mentioned. This

350 See *Proceedings*, 15:125.

351 See *Proceedings*, 21:32.

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arrangement protected the developer of the Pearson terminals from serious reductions in passenger volume and revenues resulting from government expansion of nearby airports. It involved a commitment from the government to avoid actions at airports within a 75 km radius which would reduce Pearson traffic below a 33 million passenger per year floor. The arrangement was subject to a provision which responded to the fact that diversions affect blocks of passengers, rather than being incremental. The provision permitted diversions of up to 1.5 million passengers below the threshold before requirements for compensation of the developers would become operative.

As well, the respective roles arrived at concerning environmental responsibilities were set out. The government would continue to assume responsibility for soil and groundwater contamination which had occurred before the commencement of the lease, while the developer would take on these responsibilities as of the commencement date.

The central features of the development plan were described as the overall dollar value of \$700 million, and the fact that development would take place in four phases, the final two being triggered by the attainment of passenger volume thresholds. As well, Terminal 1 would eventually be replaced with a terminal building "finger" extending from an expanded terminal.

While the announcement expressed optimism that development costs would be covered by airline and concession revenues, it also described the provisions in the agreement permitting the introduction of a "passenger facility charge" or PFC. A PFC is a fee paid by each passenger using the facility, and such charges are levied for the purpose of financing development by, for example, the Vancouver Local Airport Authority. In the Pearson agreements, the levying of a PFC was made subject to government approval and was permitted only in circumstances where development was required but airlines were unable to absorb the rent increases needed if developers were to finance it from the rental revenue stream. According to Mr. John Desmarais of the Department, under the Pearson agreements airlines would have had to be bankrupt before Pearson Development Corporation would have been in a position to levy a PFC³⁵².

Also outlined were the management, operational and employee transfer arrangements, whose notable features were a cost-based pricing policy for the airlines, the transfer of 160 Transport Canada employees in Terminals 1 and 2 under provisions that preserved pay and benefits, and the guaranteed employment.

The economic benefits of the redevelopment agreement were emphasized by the Hon. Jean Corbeil and his ministerial colleagues on the day of the announcement. Minister Corbeil was quoted, in the press release of 30 August 1993, as declaring that the project

352 See *Proceedings*, 12:63.

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would "...make Pearson International Airport an attractive and efficient world-class gateway for the Canada and North America." The Hon. Doug Lewis referred to the "shot in the arm" which a \$1.1 billion investment (including runway development and the terminal redevelopment project) would give to the Toronto construction industry and the regional economy.

Following the announcement, the initiative passed to officials of the Department of Justice, who were involved in drafting the legal text of the agreements. As well, certain agreements remained to be finalized as negotiations wound down.

H) Local Airport Authority Issues

During the negotiation of the agreements, there had been another cycle of discussion and activity relating to the formation of a Toronto local airport authority, and its quest for federal recognition.

In a letter dated 9 March 1993, the Greater Toronto Regional Airport Authority (GTRA) had advised Minister Corbeil of its formation and anticipated incorporation as a non-profit organization. In response to earlier ministerial requirements for evidence of the support of affected municipalities, the letter was accompanied by summaries of the resolutions of the regional and municipal councils participating in the GTRA. It provided, as well, a list of its 10 appointed Directors. The letter requested that the federal government proceed with the recognition of the GTRA as a Local Airport Authority and meet with its representatives to clarify any remaining issues³⁵³.

According to Robert Bandeen, who became the Chair of the GTRA in the spring of 1993, the prevailing view among board members at that time was that "...we were set up and ready to go" with a board, financing, and technical advisors in place³⁵⁴. Mr. Bandeen wrote to the Minister of Transport in early May, asking for an urgent meeting and for formal recognition by the federal government so that the process of negotiating the transfer of Pearson Airport could begin.

The reply to the GTRA's initial letter from Minister Corbeil, dated 6 May 1993, requested unconditional resolutions of support from the five regions and the major municipalities, just as the Minister had requested from GTRA representatives in a meeting outlined by Mr. Michael Farquhar, then head of Transport Canada's Airports Transfer Task Force³⁵⁵. At this meeting, the Minister had also indicated concerns about some of the

353 See *Proceedings*, 5:61.

354 See *Proceedings*, 5:29.

355 See *Proceedings*, 7:47-48.

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resolutions which had already been passed by various councils in the Toronto area and communicated to him.

On 17 February 1993, the City of Mississauga had passed a resolution supporting the formation of a Local Airport authority, and affirming a 26 November 1992 resolution of the Regional Council of Peel (of which Mississauga is a member) endorsing the recommendations of a report calling for the formation of a Local Airport Authority. Mr. Bandeen and the GTRAA felt that these resolutions confirmed the support of Mississauga for their initiative³⁵⁶.

On 25 February 1993, however, The Regional Council of Peel had passed a further resolution affirming support for the transfer, to a Local Airport Authority, of "...primarily and firstly Lester B. Pearson International Airport and Toronto Island Airport together"³⁵⁷.

There was thus a clear basis for the concerns expressed in Minister Corbeil's letter of 6 May 1993 that affected municipalities had not reached the needed level of agreement. Federal concerns could only have increased when, on 13 May 1993, the Regional Council of Peel passed an additional resolution indicating that "...the Region of Peel strongly opposes the transfer of the Lester B. Pearson International Airport without assuming at the same time the Toronto Island Airport"³⁵⁸.

On 13 May 1993, at a meeting between the Minister of Transport and Mr. Bandeen, Mr. Bandeen, according to government officials, agreed to provide the Minister with resolutions from the affected municipalities expressing support, without qualification or reservation, for the establishment of a local airport authority to manage Pearson Airport.

On 15 June 1993, a letter to the Minister from Mr. Bandeen called for immediate recognition of the GTRAA and its involvement in negotiations for redeveloping the terminals and other issues, in part so as to dispel "speculation" that "...recognition is being withheld so that a local airport authority will not have any input into these matters"³⁵⁹. The letter listed the various councils that had provided clarified resolutions of support, and went on to refer to the Mississauga resolution of 17 February as evidence of Mississauga's support. It added that the Mississauga Council's consideration of a request for a clarifying resolution had been deferred because of controversies triggered by runway expansion issues³⁶⁰.

356 See *Proceedings*, 5:51.

357 See *Proceedings*, 7:48.

358 See *Proceedings*, 7:48.

359 See *Proceedings*, 21:50.

360 See *Proceedings*, 7:49.

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According to Mr. Farquhar, correspondence had been drafted for the Minister's signature in the expectation that a satisfactory resolution would be forthcoming from Mississauga around 24 June 1993; however, this was never received. A draft covering note to the Minister stated that the correspondence should only be finalized after receipt of the Mississauga resolution: "Even if the Regional Municipality of Peel reconfirms its former resolutions on the proposed Toronto Island Airport transfer, it would still be appropriate to endorse the GTRAA in light of our recent experience in Edmonton"³⁶¹. According to Mr. Farquhar, the Edmonton experience had been one of additional complications arising from an attempt to transfer two airports at once, suggesting that the focus of the GTRAA on managing only Pearson would be preferable. More broadly, the note was described as an example of the various views, options and suggestions which officials normally provide a minister, who considers them along with advice from political advisors and colleagues in arriving at an independent decision³⁶².

Minister Corbeil did not send the correspondence, but rather met with both Mr. Bandeen and Mississauga Mayor Hazel McCallion in early July, 1993. At these meetings, he reiterated the need for consistent resolutions of unconditional support. He urged the Mayor of Mississauga to provide a resolution endorsing the formation of a Local Airport Authority for Pearson Airport, worded so as not to preclude the possibility of the subsequent transfer of Toronto Island. These meetings were followed up with letters dated 11 August 1993 which again repeated the Minister's position, and stated his commitment to endorse the GTRAA if Mississauga would provide the requested resolution of unconditional support³⁶³.

In return, the Minister received a letter from Mr. Bandeen dated 18 August 1993. This argued that the 17 February 1993 Council of Mississauga resolution already gave the unconditional support requested, but went on to say:

The directors of the GTRAA understand that the Mayor of Mississauga is not prepared to support the revision of the resolution you requested as she would like both LBPIA (Pearson Airport) and Toronto Island Airport to be contemporaneously transferred to, and operated by, a local airport authority³⁶⁴.

This is how matters stood until the Pearson Agreements were signed. Correspondence from the Minister to Mr. Bandeen on 7 October 1993 suggest that little progress was achieved during the remainder of the summer. Indeed, as Mayor McCallion informed us

361 See *Proceedings*, 7:50.

362 See *Proceedings*, 7:53.

363 See *Proceedings*, 7:50.

364 See *Proceedings*, 7:51.

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during her subsequent appearance, the Mississauga Council did not withdraw its requirement for Toronto Island Airport to be included in the transfer until 1994.

Mayor McCallion's testimony indicated the nature and degree of personal and political conflict besetting attempts to form a local airport authority in 1993. Her antipathy towards the GTRAA was apparent in her references to the "illegal airport authority"³⁶⁵, and in her caustic assessment of the role of its Chairman, Mr. Bandeen: "I can assure you, Mr. Bandeen was the problem"³⁶⁶.

As of early October 1993, Minister Corbeil's view was that Mississauga was by no means on-side. Mayor McCallion's insistence that Toronto Island be included had not evaporated³⁶⁷. At the same time, the City of Toronto was strongly against the inclusion of Toronto Island under the jurisdiction of a Local Airport Authority³⁶⁸.

There was thus a high probability that a local authority established at this time would have been seriously hamstrung by disagreements over its proper scope. Minister Corbeil also had to recognize the reality that the effective functioning of Pearson Airport was critically dependent on the cooperation of Mississauga, given that its lands are almost entirely within Mississauga's boundaries. The possible significance of this was made very clear by Mayor McCallion during our hearings. She had resolved disputes with the builders of Terminal 3 over the payment of levies and other matters by telling them that if Mississauga's requirements were not met, they had better plan to "...build the largest septic that they could find for Terminal 3 because we would not hook them up to either the sewage system or water"³⁶⁹.

Also, the Minister felt that it would have been unreasonable to set aside the fifteen months of work following the release of the Request For Proposals in order to pursue negotiations with a local airport authority that had not yet been set up, and which might require a considerable period before becoming operational, just because Mr. Bandeen had doubts about the ability of the government to negotiate a good agreement with the developers³⁷⁰.

Members of the GTRAA believed, as has been seen, that they were ready to proceed following incorporation in the spring of 1993, and that officials in the Department of

365 See *Proceedings*, 20:7.

366 See *Proceedings*, 20:8.

367 See *Proceedings*, 21:62.

368 See *Proceedings*, 21:55.

369 See *Proceedings*, 20:06.

370 See *Proceedings*, 21:62.

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Transport supported their recognition³⁷¹. Their broader concern was that, in the event of recognition, they would have to live with an agreement reached by Transport Canada and the developers, without their participation³⁷². This concern may have been exacerbated by reports from Mr. Chern Heed, then manager of Pearson Airport. He was described as being "extremely upset" by the agreements taking shape in late summer of 1993. GTRAA's attempts to obtain recognition were not abandoned in the face of these developments, however, and discussions were held with the federal government on possible revenue-sharing among other matters³⁷³.

In the early days of the 1993 election campaign Mr. Bandeen took his concerns to the media. In the *Toronto Star* of 26 September, for example, he described the government's handling of the Pearson terminals issue as "really scandalous," a phrase that Mr. Bandeen acknowledged under questioning might have reflected a degree of "over-exuberance"³⁷⁴.

According to Minister Corbeil, the rising tide of criticism of the Pearson Airport agreements which surfaced in the media during September and October 1993 was chiefly due to the efforts of one disaffected individual. In the Minister's view, the public interest was largely ignored in this effort, which focused on "the position which this person would eventually be able to occupy if the local airport authority were established, and which could restore the position of command which he had gloomily occupied several years before"³⁷⁵.

I) Closing Issues

The completion of negotiations, finalization of the agreements and the drafting of the required legal documents proceeded during September 1993³⁷⁶. According to the chief negotiator for the government, Mr. Bill Rowat, there were no material changes from the agreement in principle had been announced at the end of the previous month³⁷⁷. Any such changes would have necessitated repeating the process of obtaining the ratification of final agreements by Treasury Board which had taken place in August³⁷⁸.

As controversy over the deal mounted in Toronto, it became an issue in the federal election campaign, culminating with the 5 October 1993 declaration by then Leader of the

371 See *Proceedings*, 25:29.

372 See *Proceedings*, 5:40.

373 See *Proceedings*, 9:54.

374 See *Proceedings*, 9:41 and 21:95.

375 See *Proceedings*, 21:94.

376 See *Proceedings*, 10:57 and 11:61.

377 See *Proceedings*, 10:84.

378 See *Proceedings*, 12:41.

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Opposition, Jean Chrétien that, if elected, a Liberal government would review the deal. During this period, as well, there appears to have been rising concern among federal officials about the political sensitivity of the issue, accompanied by a recognition of the need to prepare for a possible review of their own contributions to it. Apprehension about how the new government would treat public servants who had been involved may have been an additional factor³⁷⁹.

According to Mrs. Bourgon, then Deputy Minister of Transport, political direction was sought twice following the issue of the Writs of Election: once from the Minister of Transport and once from the Prime Minister. This reflected her view that a general rule of government conduct is to act with caution following the dissolution of Parliament. Special efforts were thus appropriate to ensure that elected officials had the opportunity to determine the implications of this rule for the Pearson agreements, and that it was in fact the wish of the government to proceed with the deal³⁸⁰.

The first request for direction was made to the Hon. Jean Corbeil in late September. While Mrs. Bourgon refrained from disclosing the nature of this confidential discussion, it is likely to have focussed on whether or not the Minister wished to proceed with the signing of the major lease documents, as authorized in late August by Cabinet³⁸¹.

These documents were signed by the Minister on 4 October 1993, having been signed by Pearson Development Corporation officials the previous day³⁸². According to Minister Corbeil, he received no advice suggesting the need for special caution because Parliament had been dissolved, or raising concerns about the constitutionality of signing the lease documents during the election period³⁸³. It was his opinion that a legally enforceable agreement had come into existence in August, when Treasury Board had approved it, and cabinet had authorized the signing of the relevant documents. In the Minister's eyes, all to be dealt with in October was the completion of legal formalities and the related paperwork³⁸⁴.

The second request for direction reflected developments in the election campaign, and related to the signing, scheduled for 7 October 1993, of the final group of documents involved in closing the deal. On 5 October 1993, Liberal Leader Jean Chrétien requested in a speech that the Prime Minister put the Pearson Airport deal in the freezer until after the election; on the following day he declared that an elected Liberal government would

379 See *Proceedings*, 19:65.

380 See *Proceedings*, 19:57 and 19:59.

381 See *Proceedings*, 19:56.

382 See *Proceedings*, 12:40.

383 See *Proceedings*, 21:98 and 21:100.

384 See *Proceedings*, 21:00.

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immediately proceed to review the deal. These statements prompted Mrs. Bourgon to contact Mr. Glen Shortliffe, then Clerk of the Privy Council, about the possibility that prime ministerial direction would be appropriate, given that Prime Minister Campbell's prospective successor was calling on the government to alter its signing schedule³⁸⁵.

Mr. Shortliffe testified that, given the political contentiousness of the issue, he had agreed with Mrs. Bourgon that the Prime Minister should be consulted³⁸⁶. He stressed that the need for consultation arose from the political circumstances; it did not imply that officials believed that signing the final documents during an election campaign might be legally or constitutionally inappropriate³⁸⁷. Mr. Shortliffe's view was that the constitutional powers the government remain unfettered during an election and prior to a defeat at the polls, but that the regular processes of cabinet decision-making are suspended and new initiatives would not normally occur³⁸⁸. Mrs. Bourgon also believed, that the dissolution of Parliament for an election does not affect the legal powers of a government but that officials must act with caution after this point, and must be careful to reflect judgements from the political level about the limits of appropriate government action³⁸⁹.

Also, while officials believed that the government retained the capacity to abandon the deal as late as 7 October 1993, they saw such a decision as raising issues of legal liability³⁹⁰. According to Mr. Shortliffe, the deal had been made in late August, although it would not become effective until expressed in contractual documentation³⁹¹. Discussions with legal counsel within the Privy Council Office led him to believe that a "very high" legal liability had been incurred even before the signature of the lease documents on 4 October 1993³⁹².

Mrs. Bourgon prefaced her comments to the Committee by stressing that she is not a lawyer and that her views did not reflect specific legal advice. She believed that some degree of legal liability of the Crown was incurred as early as 18 June 1993, when the letter of intent was jointly signed with the developers, and that such legal liability had increased as subsequent steps, such as the 27 August Order in Council, were taken. The degree of liability incurred at any point, however, could only have been established definitively by the courts.

385 See *Proceedings*, 19:59.

386 See *Proceedings*, 24:70.

387 See *Proceedings*, 24:98.

388 See *Proceedings*, 24:100-101.

389 See *Proceedings*, 19:60.

390 See *Proceedings*, 24:71.

391 See *Proceedings*, 24:69.

392 See *Proceedings*, 24:72.

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Following his consultation with Prime Minister Campbell, on 7 October 1993 Mr. Shortliffe instructed Mrs. Bourgon to proceed. She, in turn, sent a fax to Mr. Rowat, who on 4 October had been delegated by Minister Corbeil to sign the remaining documents. The fax advised Mr. Rowat that Prime Minister Campbell had instructed Mr. Shortliffe to proceed with the signature of remaining legal documents relating to the Pearson agreement at 2 p.m. on 7 October 1993; that Minister Corbeil had been advised of this instruction and agreed; and that Mr. Rowat was thus authorized to sign the relevant documents³⁹³.

Nineteen documents were to be signed on 7 October 1993. They consisted of four relating to conditions precedent to the closing of the Pearson contract, fourteen documents relating to short forms of the agreements already signed and ancillary agreements addressing minor operational matters, and a final document authorizing the release of documents placed in escrow. After signing all but the last, Mr. Rowat turned these over to the escrow agent, from the firm of Cassels Brock & Blackwell, who dealt with them according to the terms of escrow.

Mr. Rowat, after determining that the documents were in order and that the conditions precedent to release from escrow had been met, signed the Authorization to Release Escrowed Documents. According to Mr. Rowat, the Pearson agreement was concluded when, and only when, this final document had been signed both by himself and Mr. Coughlin, on behalf of the developer (22 September 1995 letter from William Rowat to Senator Finlay MacDonald). The signing of the release from escrow was done at around 4 p.m. on the afternoon of 7 October 1993, at which point, the Pearson deal became a contractual reality³⁹⁴.

3. Observations and Conclusions

A) Process

As at earlier stages, we systematically asked officials who had had significant responsibilities at this stage for their views on the process. In particular, we asked them to state their personal opinions on whether their work had been compromised by requirements for speed, whether their work had been subjected to interference from the political level, whether lobbyists had influenced their decisions and whether, more generally, they were satisfied that the requirements of due process had been met.

Without exception, responsible officials affirmed the integrity of the process and of those who had participated. The process following the announcement of the Best Overall Acceptable Proposal, including discussions to resolve pre-negotiation issues,

393 See *Proceedings*, 10:75.

394 See *Proceedings*, 22:141.

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negotiations, cabinet approval and signature of the contracts was endorsed by, in particular, the Hon. Jean Corbeil, Minister of Transport during this period³⁹⁵; Mrs. Huguette Labelle, Deputy Minister until 25 June 1993³⁹⁶; Mrs. Jocelyne Bourgon, Deputy Minister after 25 June³⁹⁷; Mr. Ran Quail, Chief Negotiator during January and early February; Mr. David Broadbent, Chief Negotiator from 12 February 1993 to 15 June 1993³⁹⁸; and Mr. William Rowat, Associate Deputy Minister of Transport through this period and chief negotiator from 15 June 1993 until 7 October 1993³⁹⁹.

It should be noted that Mr. Broadbent's strong affirmation of the integrity of the process and the people involved was accompanied by his opinion that, from a technical point of view, the process was flawed by the unsettled status of the Guiding Principles and the forty-year lease extension to which Air Canada had perceived the government to be committed when the Request For Proposals was issued. In Mr. Broadbent's view, this added needless complexity and several months to the negotiations⁴⁰⁰.

Unqualified endorsements of the integrity of the process were also obtained from Mr. Glen Shortliffe, Clerk of the Privy Council during this period⁴⁰¹; and Mr. Mel Cappe, the senior Treasury Board participant⁴⁰². As well, Mr. Stehelin of Deloitte & Touche indicated that he had not been subject to political pressure or interference⁴⁰³.

Furthermore, we posed the same questions to a series of officials who worked on the project teams managed by the officials listed above. The result was the same: all endorsed the process as being fully in compliance with the requirements of due process and public service norms.

In the course of our hearings, we found no evidence to contradict the participants' unanimous affirmation of the complete integrity of the process following the announcement of the Best Overall Acceptable Proposal, including the discussions to resolve pre-negotiation issues, negotiations, cabinet approval and signature of the contracts. As at previous stages, the safeguards in the process to ensure that private

395 See *Proceedings*, 21:100; 21:65; 21:67-68; 21:71 and 21:96.

396 See *Proceedings*, 8:40.

397 See *Proceedings*, 19:108.

398 See *Proceedings*, 9:83.

399 See *Proceedings*, 11:30.

400 See *Proceedings*, 9:122.

401 See *Proceedings*, 24:105.

402 See *Proceedings*, 14:12.

403 See *Proceedings*, 13:28.

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interests do not override the public interest as perceived by the democratically elected representatives of the people had been fully operative during this phase of the process.

B) Policy

The negotiation and conclusion of the contract to redevelop Terminals 1 and 2 of Pearson Airport raises two broad policy issues. The first issue reflects the same general question about changes in the Pearson Airport environment that we considered in relation to earlier stages of the process. With respect to the concluding phase, the question becomes: did circumstances change between 7 December 1992, when the discussion and negotiation process was launched, and the date of closing, in a way which would have warranted terminating the process?

The second fundamental policy question is unique to the concluding phase of the process. It addresses the merit of the agreement ultimately reached: was the agreement between the Government of Canada and Pearson Development Corporation set out in the 7 October 1993 documents in the public interest? This question is addressed following the discussion, immediately below, of the circumstances under which the deal was finalized.

Our evidence suggests that there were two potentially significant changes in the Pearson environment after 1992. First, there was discernible progress towards the formation of a local airport authority. This raised anew the question of whether or not redevelopment should be postponed until a recognized authority was in place to manage it. Second, the issuing of the Writs of Election on 8 September 1993 meant that the agreed closing date would fall within the election campaign period. This, in combination with growing controversy over the deal, raised the question of whether the closing of the deal should be deferred.

(i) LAA Developments

The announcement of a Best Overall Acceptable Proposal appears to have provided the disparate local airport authority factions that had existed in the Toronto region during much of 1992 with a powerful incentive to come together. By the end of March 1993, a single organization, a non-profit corporation entitled the Greater Toronto Regional Airport Authority (GTRAA), was actively seeking recognition from the federal government. However, there was substantial disagreement between the Regional Council of Peel, representing Mississauga, and the other Councils over the scope of the proposed airport authority. Disagreement over whether devolution should be of Pearson Airport alone, or Pearson Airport along with Toronto Island, persisted until the agreements were signed, and beyond.

As we have seen, Minister Corbeil and at least some of his officials appear to have disagreed over whether the GTRAA qualified for federal recognition, as of June 1993. It is

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important to recognize that differences of opinion between ministers and officials do arise from time to time, and do not normally imply an effort to subvert the public interest on either side. Issues of public policy are rarely simple, and are typically replete with multiple opportunities for people to disagree, in good faith. As was observed by Mr. Farquhar, the official involved, ministers frequently address issues on the basis of information or perspectives not available to officials⁴⁰⁴.

For the same reasons, a disagreement between a minister and an official does not necessarily indicate error, or bad faith, on the part of the minister. If public officials were always right, there would be no reason to make them accountable to ministers and Parliament. We could simply hand over the challenges of government to the public service, and dispense with the inconvenience of democracy.

It is highly likely that the imprecision of the policy developed for the Minister by his officials contributed to disagreements over the issue of Local Airport Authority recognition, both within the Department and between the Minister and members of the GTRAA. According to officials, the policy did not require unanimous agreement among affected municipalities. It did not, however, spell out criteria for selecting the "principal local governments" in the region served by a particular airport. Furthermore, the policy specified only that a resolution endorsing the structure of a prospective authority need be passed by each of these governments. This left considerable room for dispute about the degree of variation among resolutions that would be consistent with the objectives of the policy.

It could be argued that the GTRAA, as of 15 June 1993, had met the narrowly literal requirements of the policy, as just described. Resolutions of support had been passed by all the councils from which support was required by the federal government. The difference between Mississauga and the other municipalities related to the scope of devolution, not the structure of the organization.

As Minister Corbeil must have found, however, when he visited Mississauga Mayor McCallion and GTRAA officials in early July 1993, the significant differences between these parties over the scope of devolution were also highly personal. Mayor McCallion's aversion to Mr. Bandeen, Chairman of the GTRAA, was amply evident two years after the fact during her appearance before us as a witness.

Furthermore, the 13 May 1993 resolution of the Regional Council of Peel did not merely express a desire for the transfer of both Pearson Airport and Toronto Island. It declared that the Region "strongly opposes the transfer of the Lester B. Pearson International Airport without assuming at the same time the Toronto Island Airport." In other words, Pearson was not to be transferred in advance of Toronto Island. Yet the City of Toronto,

404 See *Proceedings*, 7:53.

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which co-managed the Toronto Island Airport in a tripartite arrangement with Transport Canada and the Toronto Harbour Commission, was already on record as opposing the inclusion of Toronto Island in any transfer of authority to a local airport authority.

While the criteria for granting federal recognition to aspiring local airport authorities did not require complete unanimity among the principle municipalities, the support of Mississauga was clearly essential for obvious practical reasons. As has been seen, the location of Pearson Airport within the boundaries of Mississauga gave Mayor McCallion a great deal of leverage, and in her dealings with the developers of Terminal 3 she had amply displayed her awareness of this and her skill at defending the interests of Mississauga as she saw them. Federal recognition of the GTRAA, given the seriousness of the unresolved policy differences among its participants, would have been irresponsible.

Delaying redevelopment until local airport authority issues could be resolved was an equally unsatisfactory option. The facts as the Minister knew them in the summer and fall of 1993 left little room for doubt about what the probable consequences of a delay in negotiations for this purpose would have been. The issue of the inclusion of Toronto Island Airport was resolved only in 1994, when Mayor McCallion reluctantly abandoned her earlier position, something of which there was no sign in the summer of 1993. At that time, it seemed clear that a delay until the resolution of differences between Mississauga and other GTRAA members would have proved to be equivalent to an indefinite postponement. As Minister Corbeil reminded us, this would have jettisoned the results of nearly three years of work by public officials and successive ministers. Had such a course been taken, it would have been rightly criticized as involving an abominable waste of the resources already expended.

It would also have been inconsistent with the government's view of what was needed, which, as we have seen in earlier sections of this report, was directly grounded in the realities for users of Pearson Airport. A decision to delay would have ignored the need for redevelopment of the terminals which the government had recognized in 1990 and which had not substantially diminished during the years between 1990 and 1993. If anything, the need had grown steadily more acute in Terminal 1. To deny it in 1993 would have been no more responsible than to deny it 1990, and would have added the costs to the public of inconsistency.

In conclusion, we think that it would have been irresponsible to delay redevelopment in 1993, in the hope that the political problems besetting Toronto's local airport initiative would soon be resolved. This would have to substituted wishful thinking for effective action in addressing the problems in Terminals 1 and 2.

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(ii) The Election

Mounting controversy over the deal was compounded by the issuing of the Writs of Election during the weeks when the Pearson agreements were being finalized. As has been seen, by early October 1993 the Pearson agreement had evolved from a substantially local controversy, propelled by certain individuals with an immediate stake in the process, to a national election issue. The Leader of the Liberal Party, who opinion polls suggested would in all probability form the next government, had publicly called on Prime Minister Campbell to postpone the closing of the deal, and had announced that a concluded deal would be reviewed if a Liberal government were elected.

As has been seen, officials believed that the deal had been concluded as of late August 1993 and that, while the government could refuse to sign the legal agreements and closing documents, to do so without some form of agreement with the developers would have incurred a substantial legal liability. According to the Minister, only the paperwork remained to be done in October, which did not constitute, in itself, a significant government initiative.

We included in our hearings a panel of academics qualified to identify and discuss the constitutional and political issues faced by the Prime Minister and Minister of Transport in early October. The panel comprised Professor Emeritus J.R. Mallory, University of McGill; Professor John Wilson, University of Waterloo; and Assistant Professor Andrew Heard, Simon Fraser University.

Professor Mallory distinguished between the election campaign period and the caretaker period during the interval between a government defeat in the House or at the polls, and the swearing in of a newly elected government.

During election campaigns, according to Professor Mallory, governments retain the authority and the duty to make those decisions they believe to be necessary⁴⁰⁵. In practice, few significant decisions are made during electoral campaigns, because ministers are normally campaigning. However, important decisions, such as that of the Diefenbaker government to devalue the dollar during the 1962 election, have sometimes been made. Voters have the final verdict on such decisions on election day, and a successor government may choose to review or change them.

During the interval between the defeat of a government and the swearing-in of its successor, in Professor Mallory's view, the situation is different. He advised us that there is

405 See *Proceedings*, 24:5-6.

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a sound body of constitutional precedent that a government that has been defeated at the polls should "refrain from consequential policy decisions and major appointments"⁴⁰⁶.

Professor Heard came to a similar conclusion, based on two distinct lines of argument. One focused on historic precedents and the other on the implications of broader constitutional principles.

With respect to historic precedents which might yield a constitutional convention, Professor Heard argued that there is no evidence of recognition of any rule requiring governments to limit their actions during election periods. Discussions upon which a rule might be based relate only to the period after the election. Professor Heard cited a number of Canadian cases in which there was a clear recognition that during this period a government defeated at the polls, or in the House, has to limit itself to routine matters⁴⁰⁷.

Professor Heard also argued that historic precedents are not the only source of norms, and that constitutional principles alone can also yield rules. He argued that the principle of responsible government centrally involves the entitlement of a cabinet that can command majority support in the House of Commons to provide binding advice to the Governor General. This entitlement implies that "...a cabinet is free to do as it wishes until it is defeated either on a vote of clear confidence in the House of Commons or in a vote in the general election"⁴⁰⁸. According to this argument, the signing of the Pearson agreements during the election period did not violate any constitutional conventions⁴⁰⁹.

Professor Wilson took a different view. Arguing first that conventions about appropriate government behaviour need not be explicitly stated or illustrated in exemplary cases in order to exist, he went on to claim that:

...it is a well-established principle of parliamentary government that once Parliament has been dissolved and an election campaign is underway, the government's freedom of decision-making is firmly restricted and should be confined to dealing with only routine matters of administration, apart, of course, from any emergency situation which may arise⁴¹⁰.

This alleged convention was justified on two grounds. Professor Wilson first argued that once Parliament is dissolved, the executive ceases to be subject to those parliamentary

406 See *Proceedings*, 24:6.

407 See *Proceedings*, 24:18.

408 See *Proceedings*, 24:19-20.

409 See *Proceedings*, 24:21.

410 See *Proceedings*, 24:9.

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constraints that ensure that it is kept responsible. The powers of the executive should therefore undergo a corresponding restriction during this period and adhere to the limits set out in the caretaker convention⁴¹¹.

His second argument was that a government may take a decision in the campaign period but then be defeated in the election. Should this happen, it will never have to take responsibility for that decision. The kind of scrutiny exercised by the media during a campaign is not the equal of that exercised by Parliament, and cannot substitute for it as a constraint upon government. Governments should therefore restrict themselves to routine administrative decisions in this period, except in cases of emergency.

On reflection, we do not find Professor Wilson's arguments persuasive. His claim that a convention may exist without evidence in the form of precedent or earlier affirmation is highly problematical in our view. It makes "convention" a metaphysical notion that could be used by anybody to argue on behalf of anything that they happen to believe should be a rule. Constitutional conventions are, however, more than personal beliefs about what governments should or should not do. They are generally accepted rules of behavior, and cannot be said to exist in the absence of some evidence (of whatever kind) that a rule is generally accepted.

Secondly, we do not agree that the caretaker convention applies whenever Parliament is not in session, immediately available to call governments to account. If this were the convention, then governments would be limited in their capacity to act during summer and winter recesses as much, and for the same reasons, as during an election. By this unconvincing standard, the newly-elected Liberal government violated the constitution by deciding to cancel the Pearson agreements when Parliament was not in session (Parliament did not sit until 17 January 1994, six weeks after the cancellation announcement). Yet no one has suggested this.

Third, we do not agree with the argument that a government may act and then be defeated, and thus never be held responsible. On the contrary, as Professor Heard reminded us, an election is the penultimate moment of responsibility in our parliamentary system⁴¹². At this time the government is held accountable directly by the people rather than by the peoples' representatives in Parliament. The consequences a government suffers if its performance is held to be unsatisfactory are far more immediate than are ever achieved by Parliament. An election period is not, therefore, an interruption of the constraints of responsibility which calls for restricted government decision-making.

411 See *Proceedings*, 24:9.

412 See *Proceedings*, 24:30-31.

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Even if Professor Wilson's main arguments were valid, however, this would not prove that a convention exists. It would only provide a persuasive reason for people to adopt one. Indeed, the fact that the two other academics on our panel did not agree with Professor Wilson's view confirms that a convention has not yet emerged. If it had, there would not be significant controversy about its existence.

Finally, it is noteworthy that the views of Professors Mallory and Heard broadly support those of the senior public servants with whom we discussed this issue. Mrs. Bourgon's comments on the need for caution do not, as was claimed by Professor Wilson, support the existence of a "caretaker" convention⁴¹³. Rather, they imply that public servants should take special precautions during the election period to ensure that their actions reflect the perceptions of elected politicians. As has been seen, the Minister of Transport did not regard the closing of the deal agreed upon and publicly announced in August as a new initiative; thus he had no doubts about the appropriateness of proceeding to sign the agreements.

We therefore agree with Professors Mallory and Heard on this issue. No constitutional convention restricts government decision-making during the period between the issue of the Writs of Election and the vote. The Prime Minister and Minister of Transport committed no constitutional infraction in the fall of 1993 when they played their respective roles in closing the Pearson Airport deal. On the contrary, they were merely performing their duty to continue to govern until the will of the people had been expressed on election day.

(iii) The Final Arrangement

Was the project put in place by the Pearson agreements in the public interest? This question remains to be considered once it has been established that nothing that happened between December 1992 and October 1993 would have justified, or required, stopping the process.

A preliminary finding from our hearings is that there is no simple logic that directly answers this question. The Pearson agreements set out the details of an extremely complicated arrangement, negotiated through a complex series of trade-offs and balances. It would almost certainly be misleading to consider any single aspect of the deal in isolation, against a standard that did not reflect the relationship of that aspect to the overall package.

For example, the Crown had to balance the objective of obtaining an attractive financial return to the Crown against the objective of allowing a sufficient return to the developers to enable them to fulfil their development commitments. Too large a rate of

413 See *Proceedings*, 24:13-14.

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return for the Crown would have made the project unworkable, and could have resulted in the terminals returning to government hands after the bankruptcy or withdrawal of the developers.

Also, both the Crown and the developers had to structure their arrangements so as to avoid unmanageable burdens on the airlines and other tenants. Excessive burdens would have either driven tenants to other airports, or out of business, ultimately reducing the revenue stream to both the Crown and developers. If a tenant had passed heightened costs on to the travelling public, such charges might have made Pearson uncompetitive with other airports and thus reduced revenue flows to the Crown and developers as a result of the long-term erosion of business⁴¹⁴.

A) Good or bad?

The Pearson agreements met the key objective that had triggered the 1990 initiative. They would have resulted in the immediate redevelopment of the terminals so as to restore and maintain their functionality, at no cost to the Canadian taxpayer. They would also have ensured the longer-term expansion of terminal capacity as required, again at no cost to the Canadian taxpayer. The result, which even critics of the agreements do not attempt to deny, would have been to replace a crumbling Terminal 1 and a Terminal 2 with limited trans-border capacity with a truly world-class airport facility. There would also have been important indirect benefits to the public, including significant local job creation along with the long-term employment and tax revenue increases associated with the creation of airport development expertise which could be marketed elsewhere in Canada and in other countries. All of these benefits would have been gained at no cost to the Canadian taxpayer.

The fact that the travelling public would have been provided with a world-class airport facility, at no cost to the tax-payer and indeed at some profit to the Crown, is the central benefit of the deal. This project would have involved an investment, by the developers, of some \$700 million over the life of the agreements. It may be an oversimplification to describe this as a direct benefit to taxpayers, since the immediate beneficiaries would have been the airlines and other tenants. It remains true, however, that had the government retained the terminals and undertaken development to be funded by the Crown in the conventional way, taxpayers would have paid. They might have paid less than \$700 million and received less in return; but they would have paid.

Earlier chapters of this report have established the continuing need for development, the government's inability to finance it, and the unavailability for practical purposes of the Local Airport Authority alternative. Given these circumstances, it is hard to see how a deal providing \$700 million of private sector investment to accomplish redevelopment objectives

414 See *Proceedings*, 12:18.

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that would otherwise have had to be met with public spending could have failed to be good for Canadians. The real issue thus becomes: was it good enough?

B) Was It Good Enough?

If it is accepted that the agreement would have been a good thing for Canada, it can still be argued that a better agreement could have been obtained. However, the fact that this can always be done, irrespective of how good an actual deal happens to be, introduces an important cautionary note. A responsible critique of the deal should include a realistic discussion of standards of comparison, rather than simply relying on the fact that it is always possible to demand more.

We discussed the issue of comparative standards with several of our witnesses, particularly Mr. Paul Stehelin, the Deloitte & Touche consultant whose assessment of rates of return and other financial elements provided important guidance to government negotiators as the final agreements were being shaped. According to Mr. Stehelin, to identify projects truly comparable to the Pearson redevelopment initiative presented a major challenge.

The British Airports Authority, which is a publicly traded company listed on the London stock exchange, was mentioned as being perhaps the only readily comparable enterprise. To indicate the complexity of this judgment, however, Mr. Stehelin referred to the assessment conducted by the British monopolies and mergers commission of monopoly and non-monopoly revenue streams in the British Airport Authority case. The existence of a significant non-monopoly revenue stream is an important difference between enterprises such as the British Airport Authority and the Pearson redevelopment project, on the one hand, and pure utilities on the other. Utilities, like other monopolies, can pass increased costs through to the consumer. They thus face lower levels of risk and require correspondingly lower levels of return: 11.5 to 12.3 per cent under the business conditions prevailing in Canada as of 1993 was mentioned. Higher returns are required, however, to warrant business activities involving the higher levels of risk faced by airport infrastructural investment. Mr. Stehelin's assessment of the levels of risk involved in the Pearson terminals development project led him to the conclusion that it was comparable to the British Airports Authority, rather than a pure utility. In his words: "...anybody who believes that an airport is a pure monopoly doesn't understand airports. They are influenced by market fluctuations"⁴¹⁵.

With respect to rates of return on investment, we were told that as of 1993 the British Airports Authority would not consider a new terminal construction or any other project that

415 See *Proceedings*, 13:18.

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did not yield an 18 per cent return, after taxes⁴¹⁶. This contributed to the conclusion, set out in Mr. Stehelin's August 1993 report, that a rate of return in the range of 12 to 16 per cent was reasonable. Pearson Development Corporation's rate of return was negotiated down, over the course of 1993, from approximately 18 per cent to an estimated 14 per cent in the final deal⁴¹⁷.

The rate of return to the Crown also declined during the course of negotiations, to reflect such requirements as the protection of the airlines from significant short-term cost increases. According to Mr. Rowat, who negotiated this element, the bottom line was to ensure that rents to the government did not fall below the level available from the next best alternative⁴¹⁸. Mr. Desmarais described the eventual result as falling mid-way between the original Paxport offer of some \$1.2 billion and the Claridge offer of \$642 million. The estimated return to the Crown achieved in the final agreement was \$843 million, which moderately exceeded Transport Canada's \$815 million "base case" estimate of the net present value to the Crown of the terminals⁴¹⁹.

The Deloitte & Touche report of 17 August 1993 validated the judgment of negotiators, concluding that a net present value of the ground lease of between \$800 million and \$900 million represented a "fair market value consideration to the Crown"⁴²⁰. The fact that a reasonable rate of return to the Crown was achieved using the business standard employed by Mr. Stehelin is especially noteworthy when it is remembered that this was not simply a business deal. Non-monetary objectives were also being met, as reflected in Mr. Broadbent's observation that: "I'm not so sure the Crown should be making a lot of money out of Pearson. I think they should be running a good airport"⁴²¹.

A further negotiating objective had been to avoid imposing unmanageable charges on airlines and (indirectly) passengers, which would have made the airport uncompetitive⁴²². Ultimately, Air Canada had the final say about this aspect of the deal. As has been seen, during the summer of 1993, the Airline and the developer agreed on an arrangement that lowered costs to the airline as a result of an agreement, on the part of the Crown, to defer ground rents over a three-year period and agreement on the part of the developers to lower the capitalization rate and provide 10 per cent of their net concession revenues to the airlines.

416 See *Proceedings*, 13:16.

417 See *Proceedings*, 12:9.

418 See *Proceedings*, 10:88.

419 See *Proceedings*, 12:30.

420 *Report*, p. 6.

421 See *Proceedings*, 10:28.

422 See *Proceedings*, 10:88.

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On this aspect, the decisive judgement is surely not that of an outside party. Air Canada was happy, or the deal would not have been accepted. In the words of Mr. Fiore, a key Air Canada participant:

In the final analysis, after a great deal of difficult negotiations, Air Canada supported the proposal. It was the next best alternative to Air Canada actually being an equity partner, and it allowed us to make very necessary improvements at a fair cost⁴²³.

Looking back on the agreement from the perspective of 1995, Air Canada officials commended its timing, as well as the financial terms which had been negotiated. According to Air Canada's current Corporate Real Estate Director, Mr. David Robinson:

The ideal time frame to have commenced the redevelopment of Terminal 2 was in 1993 while passenger numbers were down. ...the disruption to the travelling public would have been substantially less compared with the impact it will have today and in the future⁴²⁴.

Assessing the agreement in global terms during his appearance as a witness, Minister Corbeil referred with evident pride to the concluding of the project, when:

...a final agreement wholly consistent with the interests of Canadian taxpayers and the travelling public, and intended to generate significant and beneficial economic impact(s) for the City of Toronto and the Toronto area, for the province of Ontario and for Canada as a whole was finally reached⁴²⁵.

Public service officials refrained from broad judgments on the public policy merits of the agreement. However, they did comment on the extent to which the agreement met the original objectives of the government as set out in the Request For Proposals. As has been seen, these were essentially that needed development should take place, that the government should be no worse off financially than had it continued to operate the terminals; that the airport remain competitive with other airports in terms of costs; and that new charges to airlines (and ultimately passengers) should not be onerous. **Mr. William Rowat, whose role in completing negotiations lends special authority to his comments, stated: "I think those guiding principles were met in the final agreement"**⁴²⁶.

423 See *Proceedings*, 12:78.

424 See *Proceedings*, 12:78.

425 See *Proceedings*, 21:10.

426 See *Proceedings*, 11:24.

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Mr. Rowat's predecessor, Mr. Broadbent, availed himself of the greater freedom allowed a retired public servant involved with the project in a consulting capacity:

I would not have been a party to this whole business without being able to look myself then and now in the mirror when shaving in the morning and know that what was done was right and that it was a good deal for Canada⁴²⁷.

We fully concur with these assessments. Our evidence leaves no doubt that the negotiators of the Pearson development agreements faced an enormously difficult task, given the complexity of the deal and the other circumstances detailed above. They did a superb job of ensuring that the original objectives of the government were met, and of obtaining what could have been lasting value for Canadian taxpayers .

As parliamentarians reviewing the arrangement from the perspective of global public interest, we recognize the credibility of the advice given to the government, the absence of any findings during our hearings that provide a valid basis for a contrary opinion, and that parliamentarians are not technical specialists qualified to re-negotiate after the fact on their own.

Mr. Spencer, Senior Vice-President of Finance for Claridge Properties and a director of Pearson Development Corporation, faced the government officials across the table during the negotiating process. He provided a blunt verdict: "they were slow, but they were also very tough. Very very tough"⁴²⁸.

We would add that they were very effective. They achieved an agreement that would have provided passengers using the airport and the people of Canada with an enduring example of the contribution public sector-private sector partnerships can make to the public interest.

427 See *Proceedings*, 9:83.

428 See *Proceedings*, 17:79.

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“I didn’t take notes...”

Robert Nixon

Following the Liberal election victory of 25 October 1993, Prime Minister designate Jean Chrétien moved quickly in an attempt to meet his campaign commitment to review the Pearson Airport agreements and the process that had produced them. On 27 October a telephone call was placed to Mr. Robert Nixon, well known for his contribution to public life in Ontario in a range of capacities. He had served as the Leader of the Ontario Liberal Party between 1967 and 1975 and in various cabinet positions, including Treasurer of Ontario in the Peterson government until its defeat in 1990⁴²⁹.

What was requested of Mr. Nixon was essentially to review the deal and provide a personal opinion to the Prime Minister within a month. Mr. Nixon believed that his selection was based on the Prime Minister's confidence in his judgment and while initially concerned that he was not a lawyer, felt honoured to be asked to take on what he saw as an important role in the initial stages of the new government⁴³⁰.

Mr. Nixon repeatedly stressed that he was asked to provide a personal judgment, and that he did not exercise, or seek, public inquiry powers which would have enabled him to take evidence under oath, compel the appearance of witnesses, or hold public hearings⁴³¹.

Moreover, he did not, receive a written mandate precisely specifying his terms of reference. After agreeing to review the deal, Mr. Nixon engaged Mr. Stephen Goudge, a partner in the law firm of Gowling, Strathy and Henderson; and Mr. Allan Crosbie, Managing Partner of the specialty merchant bank Crosbie & Company Inc. In addition to independent legal and financial advice from these team members, Mr. Nixon received administrative support from Mr. Brad Wilson, previously a member of his ministerial staff⁴³².

In a preliminary planning session with Messrs. Goudge and Wilson on 29 October 1993, Mr. Nixon stressed that the one-month time limit would not be extended, and the team arrived at a schedule that allowed approximately three weeks for interviews and review of information, with the fourth week kept clear for writing a report. It was recognized that the

429 See *Proceedings*, 5:17.

430 See *Proceedings*, 25:21-22.

431 See *Proceedings*, 25:25.

432 See *Proceedings*, 25:17.

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one month time-frame meant that meetings with individuals and organizations "had to be somewhat restricted in number"⁴³³.

Mr. Nixon's meetings appear to have been set up largely in response to requests for them from interested parties who were well aware of his appointment and its purpose⁴³⁴. While we were also advised that such requests were balanced with Mr. Nixon's own requirements for information, neither the Nixon report nor Mr. Nixon's statements to the Committee make clear the criteria for selection of those interviewed.

Of those who met with Mr. Nixon, eighteen also provided evidence during our hearings. Mr. Nixon's descriptions of the information they provided to him (subject in certain cases to confidentiality agreements) could thus be compared with that they provided to us directly. These witnesses affirmed in open hearings and under oath that the information they provided to Mr. Nixon did not conflict with the evidence they provided to our Committee.

By his own admission Mr. Nixon's meetings and other contacts were not lengthy, even in the case of key individuals who could have provided extensive technical information. They were also informal and in many cases no notes were taken⁴³⁵. For example, the contact with Mr. Farquhar consisted of a fifteen-minute telephone call limited largely to a discussion of basic information, along with options for the inclusion of provincial and federal nominees on Local Airport Authority boards⁴³⁶. As Director General, Airport Transfer, Mr. Farquhar could have provided (as he did during our hearings) detailed comments on Local Airport Authority policy and attempts by the Greater Toronto Airport Authority to gain recognition. Similarly, Mayor McCallion met with Mr. Nixon for only about half an hour, and Air Canada officials met with him for only an hour, as did Mr. Coughlin⁴³⁷.

As the information-gathering and analysis phase proceeded, Mr. Nixon developed headings on prominent concerns, and drafted items such as the letter of transmittal that would eventually accompany the report⁴³⁸. In fact, some two weeks before the final report was issued, well before his meetings with selected participants were completed and before Mr. Crosbie's financial review had been provided to him, Mr. Nixon had prepared detailed preliminary drafts of his report which included substantially the same conclusions as were

433 See *Proceedings*, 25:5.

434 See *Proceedings*, 25:6.

435 See *Proceedings*, 25:57.

436 See *Proceedings*, 25:49.

437 See *Proceedings*, 17:14-15 and 12:30.

438 See *Proceedings*, 25:10.

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submitted to the Prime Minister. The Nixon review was not merely a rush to judgement: it could more appropriately be termed a rush to pre-judgement.

Mr. Nixon told us that while he came to have concerns about various aspects of the substance of the agreement, the most significant concern was the signing of the agreements in the midst of an election campaign, and in the face of mounting controversy: "In my view, such an event flew in the face of normal and honorable democratic practice"⁴³⁹.

Mr. Nixon further advised us that, on the basis of the information he had gathered, including legal advice from Mr. Goudge and financial advice from Mr. Crosbie, along with his own experience, he had concluded that his advice to the Prime Minister must be to favour cancellation of the agreements⁴⁴⁰. On 24 November 1993, Mr. Nixon presented his findings and conclusions to the Prime Minister's policy advisor, Mr. Eddie Goldenberg. These, we were told were read without comment, and arrangements were agreed upon for their submission.

The submission of the report, incorporating conclusions and the recommendation, took place at a meeting on 29 November 1993 between Mr. Nixon accompanied by Mr. Wilson, and the Right Honourable Jean Chrétien, Mr. Goldenberg, and the Hon. Douglas Young, Minister of Transport. Mr. Nixon was subsequently advised that his report and the decision to cancel would be made public at a press conference scheduled for 3 December 1993⁴⁴¹.

On 3 December 1993, Prime Minister Chrétien announced that the Pearson agreements would be cancelled, and that related discussions with Pearson Development Corporation would begin immediately. The advice in the Nixon report was presented as the central basis for this decision, and the conclusion and recommendation in the report were quoted in the press release accompanying the announcement:

My review has left me with but one conclusion. To leave in place an inadequate contract, arrived at with such a flawed process and under the shadow of possible political manipulation, is unacceptable. I recommend to you that the contract be cancelled.

439 See *Proceedings*, 25:10.

440 See *Proceedings*, 25:14.

441 See *Proceedings*, 25:14.

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1. Observations

The decision to cancel the Pearson contracts was announced mere days after Mr. Nixon's submission of his recommendation. His full report was both distributed with the press release announcing cancellation and quoted within it. No other basis for cancellation was given.

The assessment of the cancellation decision therefore rests heavily on an evaluation of the specific findings set out in the Nixon report, and of the facts and analysis on which these findings were based. Our evaluation draws both on the report and the evidence provided to us by Messrs. Nixon, Goudge and Crosbie during hearings the 26, 27, and 28 of September and 6 November 1995. It draws as well on the evidence obtained in the course of our own hearings of sixty-two other individuals on this matter, during July, August, September and portions of October 1995.

A) Process

We have subjected Mr. Nixon's line of reasoning to the same standards as we applied in examining stages in the development of the Pearson agreements themselves. These standards require, in essence, participants' affirmation under oath that their work was not compromised by political pressure, that they were not manipulated by lobbyists or other outsiders, and that their activities did not take place under time pressures or other circumstances that prevented them from performing their duties to an adequate professional standard.

Mr. Nixon has assured us that the findings of his report are exclusively his own, and that his inquiry was not subject to political pressure or interference. He has, furthermore, indicated his confidence that his recommendation to the Prime Minister was "proper and appropriate"⁴⁴².

As we have seen, Mr. Nixon acknowledges that the one-month time-frame precluded meetings with everyone with whom he would have liked to have met. We take his confidence in the results of his review to indicate that it was not, in his judgment, undermined by its time-frame or other circumstances.

We have no doubts about the sincerity of Mr. Nixon's dedication to the public interest as he saw it. Our own inquiry, however, resulted in concerns about the judgment underlying Mr. Nixon's confidence in his process and its results.

442 See *Proceedings*, 25:15.

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Earlier chapters of our report demonstrate that the Pearson process, and the decisions reflected in the final agreements, were enormously complicated. Having spent over three months holding intensive hearings on this matter, we are unable to understand how a fact-finding and analysis phase lasting only three weeks could possibly have been adequate for Mr. Nixon's task, or appeared adequate to Mr. Nixon. Concerns about the adequacy of the time-frame are certainly not dispelled by the financial analysis report provided to Mr. Nixon by Mr. Crosbie, which refers to "the very tight time-frames in which we were working" and states that Mr. Crosbie's review " ... by necessity, was limited in nature" (Crosbie Report, p.1).

This concern can only deepen when we consider the number of people with whom Mr. Nixon did not meet.

Mr. Nixon **did not meet** or communicate with Mr. Victor Barbeau, who as Assistant Deputy Minister, Airports at Transport Canada had major responsibilities for the policy framework governing the Pearson process, for the preparation and release of the Request For Proposals, and for the evaluation process⁴⁴³.

Mr. Nixon **did not meet** or communicate with Mr. Gerald Berigan, the Transport Canada Director General in charge of establishing the evaluation team and the process that reviewed development proposals in 1992⁴⁴⁴.

Mr. Nixon **did not meet** or communicate with Mr. Ron Lane, who put together the evaluation team and led the evaluation process⁴⁴⁵.

Mr. Nixon **did not meet** or communicate with Messrs. Cappe or Gershberg, or any Treasury Board Secretariat official who could have explained the role of the Secretariat in the process⁴⁴⁶.

Mr. Nixon **did not meet** or communicate with Mr. Robert L'Abbé of the firm Raymond, Chabot, Martin, Paré, who could have explained the findings obtained in the course of monitoring and auditing the evaluation process⁴⁴⁷.

443 See *Proceedings*, 25:33.

444 See *Proceedings*, 25:35.

445 See *Proceedings*, 25:36.

446 See *Proceedings*, 25:41.

447 See *Proceedings*, 25:41.

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Mr. Nixon **did not meet** or communicate with Mr. Simke, of Price Waterhouse, who could have outlined advice given on such matters as the length of the preparation period for the proposal⁴⁴⁸.

Mr. Nixon **did not meet** with Mr. Raymond Hession of Paxport, who could have provided a detailed account of Paxport's proposal and the environment to which it responded, as well as Paxport's use of lobbyists⁴⁴⁹.

Mr. Nixon **did not meet** with any of the lobbyists about whose role his report comes to definite conclusions.⁴⁵⁰

Mr. Nixon **did not meet** with Mr. Shortliffe, either in the latter's capacity as Deputy Minister of Transport during the period when much of the policy framework governing decisions about the terminal was developed, or in his capacity as Clerk of the Privy Council during the negotiation and finalization of the agreements⁴⁵¹.

Mr. Nixon **did not meet** or communicate with either the Hon. Douglas Lewis or the Hon. Jean Corbeil, who could have explained why they decided to seek private sector involvement in redeveloping the terminals and provided the rationale for the various individual decisions about how to do this⁴⁵². Mr. Nixon thus chose to rely on his own impressions about the policies of the Progressive Conservative Government and their rationales, rather than information which ministers in that government could have provided.

The complete list of people who have provided us with useful information and advice, but with whom Mr. Nixon did not meet, is considerably longer. It includes academics qualified to provide advice on the issue that Mr. Nixon identified as his most significant concern, the propriety of concluding the agreements during the election campaign period⁴⁵³.

The one-month time-frame within which Mr. Nixon worked seems to us to have done more than merely limit the number of people he saw. Mr. Nixon's explanations for the omission of certain individuals from his list left us with a strong impression that he had an uncertain grasp of the nature of the Pearson process, and the respective roles of various individuals.

448 See *Proceedings*, 25:43.

449 See *Proceedings*, 25:44.

450 See *Proceedings*, 25: 44.

451 See *Proceedings*, 25:45-46.

452 See *Proceedings*, 25:38.

453 See *Proceedings*, 25:44-45.

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For example, Mr. Nixon told us that he was unaware of the identity or role of Mr. Ron Lane, who led the evaluation process. His justification of the failure to meet with or contact Mr. Lane was that it was unnecessary because of the availability of an independent evaluation from Mr. Crosbie. The departmental evaluation process, however, was a comprehensive evaluation of the proposals, including development plan, personnel transfer, industrial benefits and other considerations. It was not merely a financial analysis, for which the Crosbie report could properly be substituted.

Similarly, Mr. Nixon indicated that had he not met Mr. Robert L'Abbé, in view of the availability of the Crosbie evaluation of the value of the contracts. The role of Raymond, Chabot, Martin, Paré, however, was not to evaluate the contracts. Mr. L'Abbé and his team monitored the Department's formal evaluation process, and validated its integrity through a post-project audit.

These errors and omissions raise a fundamental question: if Mr. Nixon did not understand such basic elements of the Pearson process as the proposal evaluation and the evaluation audit, how could he have identified the people he should meet and what they should be asked during what they described to us as the relatively brief and casual meetings which occurred? Our discussions with Mr. Nixon and Messrs. Goudge and Crosbie during September and November provided no reassurance on this issue.

Our concerns about the impact of the one month time-frame go further still. It would have been extremely difficult for the Nixon team to avoid receiving a distorted view of the process, in view of the particular individuals seen, because Mr. Nixon and his advisors did not have information from other sources which would have provided some needed perspective.

Mr. Nixon found time for at least five meetings with various individuals attempting to form a Toronto local airport authority, including officials of the Ontario government which had, at one juncture, promoted one of the would-be authorities. In total, we estimate that he met with 12 individuals from the municipal, regional or provincial level of government for the purposes of his review. He told us that these meetings left him with the impression that both the contracting process and the contracts had inadequacies, that Minister Corbeil had refused to engage in discussions which could have led to recognition of the authority, and that public servants had been disgruntled⁴⁵⁴. Mr. Nixon appears, however, to have made no attempt to verify or balance these views by talking to the Minister, or by exploring in detail the issues involved in local airport authority recognition.

Mr. Nixon also met with the Liberal Party caucus from Metropolitan Toronto, including both Senators and Members of the House of Commons. We were advised that the

454 See *Proceedings*, 25:8-9.

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Terminals 1 and 2 redevelopment agreements were the only agenda item at this meeting. We note, as well, that a number of those who attended this meeting expressed fervent opposition to the agreements in statements which appeared in the media during the time of the Nixon review. Mr. Nixon's interest in the views of political parties did not, however, extend beyond the boundaries of his own.

While failing to communicate with numerous senior public officials who had significant responsibilities for various aspects of the deal, Mr. Nixon did find ample time to meet with Mr. Chern Heed, who was Manager of Pearson Airport during the 1990 to 1993 period. Mr. Heed appears to be the only federal public servant who was openly dissatisfied with the Pearson redevelopment project, although Mr. Nixon's description of his views does not include any concrete allegations of impropriety or misguided decision-making which could be tested against other evidence.⁴⁵⁵

While logistical problems prevented us from examining Mr. Heed, we think Mr. Nixon's statement that Mr. Heed was "uncomfortable" with what he perceived to be pressures and the direction of negotiations should be balanced against the fact that, as manager of the Airport, he would have been particularly vulnerable to the feelings of personal proprietorship which Minister Lewis suggested may have led some officials to drag their feet on relinquishing departmental management responsibilities. Any discomfort Mr. Heed may have felt did not, however, prevent him from joining with the rest of the team to sign the evaluation report which unanimously recommended that Paxport be selected as the Best Overall Acceptable Proposal. In perspective, discomfort on the part of an official is far from an adequate basis on which to reject a project as far-reaching as the Pearson redevelopment project.

Mr. Nixon appears to have attached substantial importance to the views expressed in his repeated meetings with municipal, regional and provincial advocates of a local airport authority. Furthermore, as if to throw into high relief the prominence given in his review to anyone with accusations to make, he went so far as to include on the agenda of his review a meeting with the caucus of the political party which had just spent an election campaign fostering public suspicion about the project.

2. Nixon Findings

For a document of only some fourteen pages in length, the Nixon report contains an imposing number of errors of fact, deficiencies of argument and questionable judgments. For the purposes of this report, we are confining our attention to findings which Mr. Nixon advised us were of direct importance to his conclusions, and which we discuss under three priority headings which Mr. Nixon employed in describing their relative importance.

455 See *Proceedings*, 25:8-9.

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A) Matters of Tertiary Importance

Given the emphasis which allegations of political manipulation and excessive lobbying received at the time of the announcement that the Pearson contracts would be cancelled, it came as something of a surprise to us that these two issues were specifically selected by Mr. Nixon for relegation to his category of least important, or tertiary, matters. Indeed, they were the only issues clearly placed within this category.

(i) Patronage

Mr. Nixon's report contains the assertion, repeated during our hearings, that Mr. Donald Matthews of Paxport had been Chairman of the Right Honourable Brian Mulroney's 1983 leadership campaign as well as President of the Progressive Conservative Party of Canada, and chief fundraiser for that party. As well, Mr. Nixon claims that the Hon. Otto Jelinek, a cabinet minister in both Mulroney governments, was employed by Paxport interests after he decided not to seek re-election in 1993. Mr. Nixon claims that these circumstances led him to suspect that patronage may have played a role in the selection of the Paxport proposal as Best Overall Acceptable Proposal in 1992.

The careful ambiguity with which this opinion is expressed suggests to us that it should not be described merely as an opinion, but recognized for what it is, an innuendo. The exact words of the Nixon report, repeated almost word for word during our hearings, are: "This (Progressive Conservative party affiliations), together with the flawed process I have described, understandably may leave one with the suspicion that patronage had a role in the selection of Paxport Inc".⁴⁵⁶

There are several inaccuracies or significant omissions in Mr. Nixon's account of the facts, which he admitted to our astonishment had no basis other than statements in the popular press⁴⁵⁷. Mr. Don Matthews was indeed President of the Progressive Conservative Party of Canada, but this was over twenty years ago. He was not chairman of any Mulroney party leadership campaign nor was he ever chief fundraiser for the Progressive Conservative Party. As well, according to sworn testimony, Mr. Jelinek was never a director of any Paxport-affiliated company, and never provided advice relating to Pearson Airport⁴⁵⁸.

Mr. Matthews clearly has a longstanding affiliation with the Progressive Conservative Party of Canada. The fundamental issue is whether preferential treatment was given to the Paxport proposal because of this. The Nixon report does not actually make this

456 *Report*, p. 9; 25:13.

457 See *Proceedings*, 30:32.

458 See *Proceedings*, 18:41.

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very serious allegation, but clearly implies it. Without preferential treatment, there would be no way for Mr. Nixon to conclude that patronage had somehow had a role in the selection of the Paxport proposal.

Mr. Nixon brings no evidence to support the insinuation of preferential treatment; it is sheer conjecture on Mr. Nixon's part. In our lengthy discussions with Mr. Nixon and his colleagues no concrete support for their views emerged, either before or during the process of seeking and selecting a best overall acceptable proposal.

Mr. Nixon attempted to support his views by referring, first, to an apparent assertion by someone affiliated with the Morrison Hershfield Group that, as of March 1992 when the Request For Proposals was released, "the fix was in." The importance attached by the Nixon team to the views of Morrison Hershfield was affirmed by Mr. Goudge, who declared that: "...as a substantiation for the conclusion that this transaction was concluded under the shadow of possible political manipulation, I considered the views of Morrison Hershfield to be a substantiation of that conclusion"⁴⁵⁹.

However, he was unable to provide any notes confirming either his meeting with or the comments made by Morrison Hershfield.

As has been seen in Chapter IV, however, the Morrison Hershfield Group had provided the Nixon team with a clear explanation of its failure to complete the proposal submission step which had nothing to do with patronage. Morrison Hershfield recognized that the Government had adopted an alternative redevelopment concept to the one upon which its proposal was based, and that its proposal did not meet the requirements set out in the Request For Proposals. The "fix" that was "in" was the Government's selection of a concept involving the divestiture of the terminals, establishing a role for the developer which Morrison Hershfield did not want to take on⁴⁶⁰.

Under questioning, Mr. Nixon acknowledged that he, too, recognized that the Morrison Hershfield proposal had not met Request For Proposals requirements⁴⁶¹. Although he claimed that Morrison Hershfield did not attempt to adapt its proposal because they felt the playing field was not even, Mr. Nixon acknowledged that the written presentation provided to him by the firm contained no suggestion of this, and was unable to provide any other evidence in support of his assertion.

⁴⁵⁹ See *Proceedings*, 25:93

⁴⁶⁰ See *Proceedings*, 30:62.

⁴⁶¹ See *Proceedings*, 30:62.

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Otherwise, Mr. Nixon supported the contention that preferential treatment had occurred by referring to vague expressions of dissatisfaction by Ontario government officials who had attempted to promote the formation of a local airport authority. Again, however, there was a complete absence of concrete evidence.

The Nixon team evidently made no effort to ascertain any facts to support the vague suspicions of preferential treatment expressed by several people during the review period. Aspersions cast at the Pearson agreements were simply accepted. We were told that, because the Nixon inquiry was not a judicial proceeding, statements were not dismissed on the grounds that they were hearsay evidence but were rather accepted, as "information"⁴⁶². As Mr. Nixon's findings demonstrate, however, this "information" was not then subjected to investigation. It was transformed instantaneously into factual opinion.

The sheer thoughtlessness of the Nixon report is apparent, equally, in the fact that no clear standard was applied to the facts as they were understood. Apparently, Mr. Matthews' affiliation with the Progressive Conservative Party was viewed to be sufficient on its own, to permit the Nixon team to see all perceived shortcomings in the process leading up to the selection of the Paxport proposal as evidence of patronage. Yet, to apply this standard would render the decision to cancel the Pearson agreements equally questionable as Mr Nixon has had a longstanding affiliation with the Ontario Liberal Party including a term as leader.

Our discussions, held under oath, with the officials and cabinet ministers who played significant roles in the selection of the Paxport proposal have yielded not a single shred of evidence that this proposal was given preferential treatment, either because of Mr. Matthews' political affiliations or for any other reason. On the contrary, the key decision-makers have consistently affirmed the integrity of the process. Furthermore, this is confirmed by the fact that the government did not award immediately the contract to Paxport, following the selection of its proposal as the best overall acceptable proposal.

Our conclusion is that the insinuation of preferential treatment contained in the Nixon report is not merely groundless; it is disgraceful.

(ii) The Role of Lobbyists

Mr. Nixon's conclusion about the role of lobbyists was that: "It is clear that the lobbyists played a prominent part in attempting to affect the decisions that were reached, going far beyond the acceptable concept of 'consulting'. "Reference is made, in particular, to concerns expressed by senior officials involved in the negotiations that their actions and

462 See *Proceedings*, 25:89.

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decisions were being heavily affected by lobbyists, an unusual level of interest by political staff, and a "climate of pressure" which resulted in the re-assignment of several officials⁴⁶³.

Following the pattern seen elsewhere in our hearings, the Nixon team provided no concrete evidence to support any of these findings. As well, the absence of any clarification of the phrase "the acceptable concept of 'consulting'" leaves the basis for Mr. Nixon's conclusions about lobbying veiled in utter mystery. Similarly, our discussions shed no light on Mr. Nixon's references to permissible norms that might be applied to lobbyists' attempts to influence public officials.

Federal legislation suggests some standards. The *Lobbyists Registration Act* recognizes lobbying as a legitimate part of the democratic process, and requires anyone who undertakes to "communicate with a public office holder in an attempt to influence" types of government decisions to provide prescribed information to the Lobbyists Registration Branch at Industry Canada. The norm expressed in this legislation is that attempting to influence public office holders is acceptable, provided that the prescribed information is made public. Types of influence that are not acceptable, such as bribery and corruption, are set out in the *Criminal Code*.

Mr. Nixon gives no indication as to whether his standard of "acceptable concept of consulting" reflects the norms endorsed by Parliament. His comments on lobbying do not suggest awareness of any infractions of the *Criminal Code* or federal lobbying registration legislation, which would have obliged him to report his information to the Royal Canadian Mounted Police, rather than employ it as a basis for vague aspersions. More broadly, Mr. Nixon provides no specific examples of the nature of his standards or of the behaviour he regards as objectionable.

We closely examined public sector officials as to the degree of influence exercised by lobbyists, and consistently found their perceptions, expressed under oath, to border on the dismissive. Nor have the lobbyists, or their employers, been able to demonstrate clearly that their efforts achieved tangible influence upon decisions. Indeed, their accounts of the activities carried out in relation to Terminals 1 and 2 place substantially greater emphasis on their role in obtaining and providing to clients timely information about government processes and the initiatives of competitors, along with strategic advice and communications services, than on the role of making representations to public officials. In the course of our inquiry, we have found absolutely no evidence that the efforts of lobbyists led any official to do anything contrary to the public interest.

There is, however, ample evidence that lobbyists were active on the Pearson Airport files. We have noted the monthly fees of several major lobbyists in Chapter III. Testimony

463 See *Proceedings*, 25:13.

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we received, in combination with information provided to other parliamentary committees, indicates that Paxport spent \$334,268 between 1 February 1990, when lobbyists were engaged to work on the Terminals 1 and 2 file, and February 1994. Claridge spent a similar amount between the release date of the Request For Proposals and 13 January 1993 (the date of the formation of the joint venture). If its overall spending followed the same pattern as Paxport's, it may have exceeded \$700,000.

The amounts spent by the principal developers on lobbying related to Terminals 1 and 2 total about \$1 million, over a period of approximately four years: substantially less than the "millions of dollars" asserted by the current Minister of Transportation during his July 1994 appearance before the Senate Standing Committee on Legal and Constitutional Affairs⁴⁶⁴. Given that an \$750 million deal was involved, and recognizing that its complexity would affect needs for government relations services, we do not think that global spending of a quarter of a million dollars per year by the developers for lobbying is excessive. Furthermore, we were repeatedly assured by both developers and lobbyists that the amounts paid for government relations work relating (directly or otherwise) to the Pearson terminals are typical for projects of this magnitude.

In our view, the fees paid to lobbyists in connection with the Pearson terminals redevelopment project do not provide any reason to single out this project, among all the other projects completed under the previous government or presently underway. In particular, levels of lobbying activity provide no basis for concerns about the integrity of the Pearson process, or scepticism towards the affirmation of its integrity by participants.

The possibility remains that the Nixon report allegations might be justified if it could be argued that, even though no individual lobbyist committed any infraction or violated any norm, the combined impact of the lobbyists was somehow excessive or inappropriate. This argument, however, is no more persuasive than those suggested by Mr. Nixon. The lobbyists were acting on behalf of fiercely competing firms. Their impact was not cumulative. If anything, the presence of several countervailing groups of lobbyists would have reduced their combined impact on the Pearson process.

Our inquiry has, furthermore, established that the pressure periodically felt by those involved in the process was entirely routine. Any project needs working deadlines in order to ensure results. Periodically, those who must meet the deadlines may feel pressures. This does not mean, however, that their work has ceased to meet professional standards, or been corrupted by sinister forces.

Finally, our inquiry has found that equally routine explanations apply to the transfers, at various points, of public officials involved in the Pearson process. With the single

⁴⁶⁴ See *Proceedings*, 11:53.

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exception of Mr. Chern Heed, these departures were unrelated to any views incumbents held about the Pearson process. Even in the case of Mr. Heed, the precise role of dissatisfaction remains unclear, since he departed in order to assume a senior position at Hong Kong International Airport which, one may assume, provided a positive inducement to leave Transport Canada. The other possible case of dissatisfaction was Mr. Victor Barbeau. As we have seen, however, his colleagues at Transport Canada were consistent in their affirmations that he made every effort to move the Pearson deal forward, and his departure from the file was voluntary, responding only to perceptions held by others about his opinions. This record does not support the insinuations in the Nixon report that several transfers were but the outward sign of a wide-ranging "climate of pressure."

Thus we are not persuaded by Mr. Nixon's views on the part played by lobbyists. Indeed, the comments in the Nixon report on the impact of lobbying are so utterly vague that our primary feeling is one of embarrassment for its author.

(iii) Miscellaneous Matters

(a) The Consortium Partners

Several of the issues ascribed importance by Mr. Nixon during his testimony were not actually assigned a place within his three priority categories. We are therefore discussing them as additional matters of tertiary importance.

Mr. Nixon claims that the agreement's failure to identify the consortium partners inevitably raised public suspicion⁴⁶⁵.

The public controversy over the Pearson agreements in October 1993 touched on various aspects, real or imagined; however, we do not recall that the identity of the partners was one of them. Nor did Mr. Nixon provide any evidence to the contrary.

Furthermore, in expanding on this issue, Mr. Goudge stated that, in the contract, "The parties are identified but were not fully made known during the election campaign"⁴⁶⁶. This suggests the objection was not to the agreements at all, but to the level of information provided between the start of the election campaign and 7 October 1993, when the agreements were released from escrow.

We are totally unpersuaded by this objection. Its factual assumptions are as dubious as its logic, which appears to argue that a late November recommendation to cancel the Pearson agreements can be justified by the government's failure to provide

465 Report, p. 11, 25:13.

466 See *Proceedings*, 27:12.

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information about them before they were concluded almost two months earlier, at which time the information was provided.

(b) Significance as a Precedent

Mr. Nixon argues that the Pearson agreements would have created a precedent that would have been seized upon by Local Airport Authorities elsewhere in Canada, which would have pressured the government to give them more favourable treatment.

The Nixon report does not specify the terms of the Pearson agreement that Local Airport Authorities might have viewed as precedents. Nor, did Mr. Nixon, at appearances before us, support this claim with concrete argument.

Our conclusion is that Mr. Nixon did not explore this issue sufficiently to understand the basis for statements of concern which he apparently heard, that local airport authorities would view the Terminals 1 and 2 agreements as a precedent.

Had Mr. Nixon explored this issue, he would have found a potential source of dissatisfaction among local airport authorities and a potential need for a clear explanation to these authorities, by the government, of the reasons why their arrangements could not replicate a private sector lease. He would not have found a reason to cancel the Pearson agreements.

(c) Competition Among Terminals

Mr. Nixon argues that the importance ascribed to competition among the Pearson terminals at the outset of the competition, and in the Paxport proposal, was somehow set aside in order to enable the formation of the joint venture between Claridge and Paxport. Claridge was then "forced" to accept a less advantageous position than would have been obtained under its own bid in order to "save" the Paxport proposal and preserve Paxport's participation⁴⁶⁷.

This argument displays the vagueness about facts present throughout the Nixon report. It is claimed, in support of the assertion that importance was initially ascribed to competition, that the Request For Proposals "implicitly indicated that competition ...was desirable." No specific reference to the Request For Proposals is provided. We have closely reviewed the Request For Proposals and find no basis for this claim. The only provision which could be construed as implying the need for competition is a routine provision indicating⁴⁶⁸ that any eventual agreement with a developer would be reviewed under the

⁴⁶⁷ Report, p. 9-10.

⁴⁶⁸ Request For Proposals, p. 53.

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Competition Act. However this is not, even implicitly, a requirement that the terminals must be in competition with one another. Officials have advised us that this review was carried out in 1993, and that no concerns were expressed by the Bureau of Competition policy about the Pearson agreements.

More broadly, Mr. Nixon's argument flies in the face of the obvious. If the Government had truly wanted to ensure competition among terminals in 1992, it would have made this a requirement of the Request For Proposals, and Claridge who already owned T3, would have been precluded from consideration. Clearly, this did not happen.

Mr. Nixon's argument also relies on some logic which can only be described as bizarre. Standards which would have favoured Paxport were softened so that Claridge could enter the competition, and then be "forced" to participate in a joint venture which would ensure that Paxport could meet other standards which apparently had not been softened.

Our conclusion is that Mr. Nixon's position does not rely on evidence. It is irrational.

(d) Cancellation Clause

The discussion, in the Nixon report, of steps required in order to cancel the agreements includes a comment on the absence of a formal cancellation clause⁴⁶⁹.

It is not clear, in the context of the report, whether the comment on the absence of a cancellation clause is intended as a critical observation, or just an observation. We are responding to it as a possible criticism, however, because the absence of a cancellation clause was raised as a criticism during our hearings, and may have created a concern among observers.

Our evidence from officials was that a cancellation clause is not normally included in long-term lease agreements of the kind required in the Terminals 1 and 2 redevelopment project⁴⁷⁰. Inclusion of such a clause would, for practical purposes, transform a long-term lease agreement into a month-to-month lease which the government could cancel at its convenience. No lender would provide financing of the magnitude involved in the Pearson agreements in the absence of certainty about the lease term.

The general conclusion which emerges here, and which was confirmed again and again during our hearings, is that officials with the required technical expertise were able to provide fully satisfactory explanations for individual technical provisions in the

⁴⁶⁹ Report, p. 13.

⁴⁷⁰ See *Proceedings*, 11:25.

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agreements. These provisions do not reflect political direction, or even discernible political interest, but rather the consistent technical competence which public officials brought to their work on the Pearson agreements.

B) Secondary Issues

Many of the allegations made in his report were placed, by Mr. Nixon, in a category consisting of matters described as having a "secondary level of general importance"⁴⁷¹.

(i) Policy Coherence

Mr. Nixon argues that the "process to privatize" Terminals 1 and 2 at Pearson Airport was inconsistent with the government's 1987 Local Airport Authority policy, which favoured the establishment of such authorities to manage major airports⁴⁷².

The Nixon report does not explore the 1987 policy, nor did Mr. Nixon provide specific references to our Committee. As has been seen in Chapter 1, the 1987 policy proposed local airport authorities as the preferred mechanism for the management of entire airports, not individual elements such as terminals. It also specifically encouraged private sector investment and involvement in traditional and non-traditional activities.

The long-term leasing for redevelopment (not "privatization") of the terminals was fully consistent with the policy, and as such was so viewed by both officials and successive Ministers of Transport. Furthermore, as we were repeatedly assured, the Pearson agreements did not preclude the formation of a local airport authority. Preparation of the agreements had included specific discussions of their transferability to a future local airport authority.

Our conclusion is that Mr. Nixon's finding of policy inconsistency is wrong.

(ii) Local Airport Authority Recognition

Mr. Nixon alleges that the Minister of Transport responded to requests for recognition of a local airport authority in the Toronto area with a "steadfast refusal...based on what, in my view, was minor and normal inter-municipal strife"⁴⁷³. The government's recognition of local airport authorities in other cities, in combination with his assessment of the Toronto situation, leads Mr. Nixon to the conclusion that "a perception existed that the

471 See *Proceedings*, 26:11.

472 *Report*, p. 8 and 25:11.

473 *Report* p. 10.

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Government's adamance (sic) that a local airport authority not be recognized was simply to ensure no jeopardy to the award of this project to Paxport Inc.⁴⁷⁴.

The Nixon report provides no evidence that independent support of the allegations of disaffected Toronto local airport authority supporters was sought or received. Our hearings with Mr. Nixon confirmed this impression. Mr. Nixon's finding is merely an uncritical repetition of unsupported allegations by individuals unable to provide an objective, or even a particularly well-informed, assessment of government policy.

Our own findings refute key assumptions made by critics of the Minister's reluctance to recognize the Greater Toronto Regional Airport Authority during 1993. First, as we have seen, the requirement for affected municipalities to provide resolutions supporting a prospective local airport authority was not a special hurdle devised solely for the Toronto area. It dated from 1990, and was originally developed in response to issues that arose in Calgary. Second, Toronto area supporters of a local airport authority were themselves unclear about the requirements specified in the government's recognition policy, a problem exacerbated by the fact that the policy left the Minister without precise guidance for dealing with some of the issues raised in the Toronto situation. Third, "minor and normal inter-municipal strife" is, in our view, a considerable understatement of the political problems impeding the formation of a local airport authority as of 1993 and for which, at that time, no ready solution was apparent.

Our conclusion is that Mr. Nixon's view (repetition of third party opinions hardly qualifies as a finding) concerning the Minister of Transport's response to demands for the recognition of a local airport authority during 1993, is based on seriously incomplete information, and is wrong.

(iii) Terms of the Request For Proposals

Mr. Nixon claimed that any proponent that had previously prepared an unsolicited proposal would have had an "enormous advantage" since expressions of interest were not sought and the submission deadline was a mere 90 days after the issue of the Request For Proposals⁴⁷⁵.

Had Mr. Nixon met with officials involved in the development of the Request For Proposals, he would have been advised, as were we, that its requirements were significantly different from those addressed by unsolicited proposals. Such proposals were made substantially redundant by the Request For Proposals, so that their proponents would have had no specific advantage.

474 Report p. 10 and 25:13.

475 Report p. 8 and 25:11.

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Mr. Nixon provides no explanation of how unsolicited proposals would have created an advantage for those who prepared them. Such an explanation would have had to take into account the fact that Claridge and a number of other firms had also submitted unsolicited proposals and would thus have shared any advantage thereby gained by Paxport.

The reference to a ninety-day proposal preparation period is also misleading. As has been seen, the formal period was extended to 127 days and there had been an extensive informal period (approximately 17 months), before the release of the Request For Proposals, during which developers knew that the government planned to seek proposals and were able to make general preparations.

No business consortium complained, either to the government at that time, or to us during our hearings, that the preparation period for the proposal was unreasonable. The only complaints of which we are aware came from the group attempting to form a local airport authority during the period when the Request For Proposals was being developed. As has been seen, however, the essential problem for this group was that its attempts had not succeeded.

Our conclusion is that Mr. Nixon's claim that the preparation of unsolicited proposals gave a substantial advantage to firms in meeting the ninety-day deadline is without foundation.

(iv) Competition among Firms

Mr. Nixon argues that information was not distributed widely enough to ensure the maximum possible number of participating firms, and that the formal proposal preparation period was too short to permit latecomers to compete effectively⁴⁷⁶.

We find these claims unconvincing, given that there was a public announcement of the government's intention to seek private sector involvement in terminal redevelopment in October of 1990; and this was widely reported in the media. As many as five unsolicited proposals were received by the Department before the release of the Request For Proposals. This would suggest that the government's interest in private sector involvement was hardly a secret.

Furthermore, officials closely acquainted with the relevant business environments testified that only a small number of consortiums had the interest and capacity to participate in a project involving the redevelopment, operation and management of terminals at a major airport. The department received no complaints from firms claiming to feel excluded from

476 Report p. 8 and 25:11.

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the process⁴⁷⁷, and no firm has complained to us that the process prevented it from competing effectively.

No firm appears to have complained to Mr. Nixon either. His report provides no concrete evidence in support of his allegations that information about the government's intentions was inadequate, and that other competitors could have been found. Nor were he and Mr. Crosbie, who also voiced this criticism, able during our hearings to substantiate their allegations. Mr. Crosbie at one point argued that the government should have prepared its own terminal development plan, and then actively marketed it as a business opportunity. This approach harks back to the traditional public tendering process and entirely sacrifices the challenge to private sector innovation which was a hallmark of the terminal redevelopment process⁴⁷⁸. It would also have involved the government in considerable initial costs.

Messrs. Nixon and Crosbie were also unable to provide any examples of cases where the government has actively marketed a Request For Proposals in the manner which they appeared to advocate. In the end, they provided no substantiation for their claims about the adequacy of the distribution of project information other than vague statements such as: "Well, I think it's a big world out there..."⁴⁷⁹.

We do not deny that it's a big world out there. However, this is not enough to establish the inadequacy of a public announcement made some seventeen months before the release of the Request For Proposals, combined with direct contacts with developers known to be interested. **Our conclusion is that Messrs. Nixon's and Crosbie's allegations that prospective developers were not adequately informed are unfounded.**

(v) Financial Qualifications

Mr. Nixon claims that "no financial pre-qualification was required in this competition," and that the selection of a best overall acceptable proposal without complete assurance of the financial viability of both the proposal and the proponent was "unusual and unwise"⁴⁸⁰. This contradicts the statement by Mr Barbeau to our Committee that:

"In the RFP, what you ask for is that the bidders...put up their business case and, of course, be ready to prove financeability afterwards."⁴⁸¹

477 See *Proceedings*, 8:61.

478 See *Proceedings*, 25:106.

479 See *Proceedings*, 25:107.

480 See *Proceedings*, 25:11.

481 See *Proceedings*, 2:65

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During our hearings, departmental officials and their independent financial advisor made it amply clear that the financial viability of the proposals had been central to the formal evaluation process, carrying a weighting of forty percent. This included an assessment, supported by Richardson Greenshields, of the capacity of proponents to live up to their initial financial commitments. The claim that financial qualifications were not required is therefore incorrect.

A demonstration of the financeability of the proposals, or the ability of the proponent to actually obtain the required financing, was left until after the selection of the Best Overall Acceptable Proposal. This was not unusual. Officials have testified under oath that this is a normal practice in major Crown projects; reflecting the fact that a demonstration obtained too far in advance of a transaction may become outdated.

Testimony made it clear that a demonstration of financeability was demanded, and demanded rigorously, following the selection of the Paxport proposal. The development of reasonable standards was one aspect of this process, reflecting Deloitte & Touche's advice to the department that it would be unrealistic to demand conclusive evidence of financeability at the front end of a development project planned to take place in several phases; since the willingness of lenders to finance the later phases would depend on the success of the earlier phases.

Application of Mr. Nixon's standards, requiring "complete assurance of financial viability" before the selection of a Best Overall Acceptable Proposal, would have dramatically restricted the scope of competition. The rule would have been: "only competitors with deep pockets need apply." Thus Mr. Nixon's complaints about inadequate requirements with respect to financeability are inconsistent with his argument that the competition should have been broadened.

Our conclusion is that Mr. Nixon's complaints about the financial standards employed in the department's formal evaluation process are ill-informed, both with respect to the evaluation process which was employed and with respect to what might reasonably have been expected, given the nature of the project.

(vi) The Public Interest

Mr. Nixon argues that the importance of Pearson Airport to the national transportation system and the Ontario economy requires it to be viewed as a national asset, and that the terminals should therefore have been placed in the hands of a body responsive to the "broadly defined public interest" rather than private sector developers⁴⁸².

482 Report pp. 10-11 and Proceedings, 25:11.

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This argument repeats the confusion, apparent elsewhere in the Nixon report, between terminals and the airport as a whole. The terminal redevelopment deal left Pearson Airport firmly in the hands of the government, which we trust Mr. Nixon would recognize as a body broadly responsive to considerations of public interest.

Mr. Nixon's argument also appears to assume that private sector-public sector partnerships cannot be structured so as to allow realization of private sector advantages of efficiency and market responsiveness while at the same time meeting public interest objectives. This assumption belongs to the 1970s, or earlier, and conflicts with the thrust of much contemporary public policy.

More immediately, to provide a reason for objecting to the Pearson deal, Mr. Nixon needed to leave the realm of generalities. He needed to demonstrate that \$750 million in redevelopment investment for the purpose of resolving universally acknowledged problems in Terminals 1 and 2, at no cost to the Canadian taxpayer, was contrary to the public interest. Neither in his report nor during our hearings did he do so. Indeed, an early draft of his report contained comments, later inexplicably expunged, applauding this investment.

According to our evidence, Mr. Nixon received from Mr. Rowat (who negotiated the final agreements) a binder containing detailed clause-by-clause discussions of public interest-related sections of the agreements, and explanations of how the public interest was protected. He was thus provided with ample assistance in the consideration of specific public interest issues, had he chosen to do this.

We conclude that Mr. Nixon's objection to private sector involvement in redeveloping airport terminals at Pearson is not persuasive.

(vii) The Length of the Lease

Mr. Nixon claims that the length of the lease, some 57 years, is excessive. Capital repayment requirements would have been met well before its expiry and technological change makes it likely that transportation in 57 years will be very different from today.

Individuals with specialized knowledge of real estate transactions told us, however, that a lease term in the vicinity of sixty to seventy years would be appropriate for a project involving redevelopment, of airport terminals⁴⁸³. The accuracy of this advice would appear to be confirmed by the Terminal 3 lease, the term of which was reflected in the Terminals 1 and 2 lease, and local airport authority leases of comparable length. Mr. Nixon did not

483 See *chap. III.*

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suggest that his opinion on this matter reflects expert advice that would conflict with that provided to our Committee.

It is impossible to deny the broader claim that transportation and airport requirements may change substantially over a sixty-year period. However, the Nixon report and Mr. Nixon's comments during our hearings leave us mystified about exactly how this would go against the leasing of the terminals to private sector developers. As a private sector operator, Pearson Development Corporation's need to protect its revenue stream and profitability would have provided a strong incentive to keep the terminals attractive to airlines and passengers, and competitive with other facilities. **As well, the lease terms required the terminals to be maintained at world-class standards. In our view, the lease was not a barrier to meeting the needs of the future. On the contrary, it helped to ensure that the developer would do more than take merely a short-term approach to emerging needs.**

Our conclusion is that, Mr. Nixon's objections to the length of the lease are without foundation .

(viii) The Revenue Stream

Mr. Nixon argues that the revenue stream to the government under the Pearson agreements was "far from overwhelming"⁴⁸⁴. He claims that returns during the early years of the agreement would have been less than in recent years, and that future returns would have relied on "aggressive" pricing, which would have run the risk of making Pearson uncompetitive.

Mr. Nixon does not specify the ideal balance implied by his argument: high enough at least to approach being "overwhelming," but not high enough to require anything that might be described as "aggressive." Several elements of the argument are, however, specific enough to permit a response.

First of all, the fact that revenue to the government during the first several years would be relatively low reflects the rent deferral arrangement. As has been seen, this package of provisions involving lowered revenues to both the government and the developer had been agreed upon in order to minimize cost increases to the airlines during a period of financial constraint. Mr. Nixon does not mention that, rather than a loss of revenue to the government, there was to be a deferral of revenues, to be paid subsequently with interest.

More broadly, complaints about the government's revenue ignore the fact that the Pearson agreements served multiple objectives: they were not simply a business deal. Even so, the specialists who advised the government concluded that the revenue to the Crown fell

484 Report p. 11 and see *Proceedings*, 25:12.

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within the range of reasonable returns. Mr. Nixon does not specify what level of revenue he might have considered acceptable, or provide a clear basis for his dissatisfaction.

According to our witnesses, the "aggressive" pricing envisioned by Mr. Nixon at later phases of the lease would only have brought charges at Terminals 1 and 2 into line, eventually, with those at Terminal 3. This is hardly a formula for uncompetitiveness. More broadly, Mr. Nixon's argument continues to ignore the implications of market forces, which would have acted on the operators of the Pearson terminals to keep costs in line with other competing hub airports.

Once again, we are unpersuaded by Mr. Nixon's complaint. His charge of a low level of revenue to the government is not merely unfounded, it is expressed in terms that are so lacking in precision that it appears to be self-contradictory.

(ix) Returns to the Developer

The report expresses Mr. Nixon's agreement with advice from Mr. Crosbie: "...as I have been advised by my business evaluation advisor the rate of return provided to the T1 T2 Limited Partnership could, given the nature of this transaction, well be viewed as excessive"⁴⁸⁵. In his appearance before us, however, Mr. Nixon put some distance between himself and this advice. He stated merely that he had received advice, which he let speak for itself⁴⁸⁶.

There are several reasons why Mr. Nixon might wish to distance himself from his original position. First, his report does not explain why he accepted Mr. Crosbie's evaluation, rather than the one prepared during the negotiations by Deloitte & Touche, and which found the return to investors to be reasonable. A hint of a justification may be found in Mr. Nixon's references, during our hearings, to the "independent assessment" provided by Mr. Crosbie⁴⁸⁷. Yet Mr. Stehelin of Deloitte & Touche was clearly independent too, as is amply demonstrated by his refusal in his March 1993 report, to validate the financeability of the Paxport proposal. Furthermore, his August 1993 report affirming that returns to the developer were not excessive was based on six months of work which must have given him a far greater degree of familiarity with the issues involved than Mr. Crosbie could have achieved in a relatively short time of less than 3 weeks.

Second, rather than saying the return to the developer is excessive, or should be so seen, the Crosbie finding says only that it "could, given the nature of the transaction, well

⁴⁸⁵ *Report*, p. 22.

⁴⁸⁶ See *Proceedings*, 25:13.

⁴⁸⁷ See *Proceedings*, 25:74.

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be viewed as excessive." This guarded statement hardly provides an adequate basis for making decisions or even meeting Mr. Nixon's more modest objective of arriving at "opinions."

The imprecision of the Crosbie finding appears to recognize that identifying a fair return with respect to the redevelopment of airport terminals is, as Mr. Stehelin advised us, no simple matter. Mr. Crosbie's report to Mr. Nixon accepts as "reasonable" the assumptions on which the financial projections of the Pearson Development Corporation were based, and arrives at an after tax rate of return of fourteen percent, which rises to 14.2 percent when management fees are included. These figures are in line with those provided to us by Mr. Stehelin and departmental witnesses.

The Crosbie report then considers the standards for judging the adequacy of these returns. One possible standard, based on returns to utilities, places the projected return within the reasonable range, even after the range has been reduced by one per cent (from that used by Deloitte & Touche) to reflect a claimed "approximate 1% decline in after tax utility returns since August 1993⁴⁸⁸.

Discussion of a second possible standard, based on rates of return for real estate investments, recognizes a variety of factors in the Pearson agreements, that add and subtract risk. It notes that the limited scope of Mr Crosbie's engagement prevented his questioning potential real estate investors as to the rates of return they would require for a terminal redevelopment project. It concludes, however, that "our preliminary sense would be that from a real estate point of view, the above projected rate of return (23.6% before taxes over the life of the project) could well be in excess of that required in the market place"⁴⁸⁹.

It is not clear whether the discussion included in the Crosbie report of returns for Terminal 3 is to be seen as implying a third potential standard, because the report recognizes that there are problems in comparing Terminal 3 with Terminals 1 and 2, as well as in establishing current rates of return. Mr. Crosbie's conclusion was that a before-tax rate of return of 14.1 per cent provides "a sense of the level of the before tax rates of return that were required by the equity owners in Terminal 3."

To Mr. Crosbie's credit, his report to Mr. Nixon attempts to convey the subjective nature of the selection of any basis for assessing rates of return, and the complexities involved. Less helpfully, the report does not discuss the respective merits of the possible standards identified and leaves the reader to make an arbitrary choice between at least two standards, one of which validates the Pearson agreement and the other of which suggests that the rate of return could well be above what the market would demand. Moreover, it should

488 *Crosbie Report*, p. 4.

489 *Crosbie Report*, p. 6.

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be kept in mind that the Toronto real estate market was widely recognized to be at the bottom of its business cycle in late 1993, raising doubts about the appropriateness of a real estate-based standard with respect to a long-term lease arrangement.

The third possible standard is markedly different from the other two. We can only suggest that, if accurate, these figures may confirm that Claridge's intentions, as described by Mr. Coughlin, were to use Terminal 3 as a first step towards acquiring a role in all three terminals, rather than solely as a source of short-term returns.

The Crosbie report thus provides an extremely fragile basis for criticizing the returns to Pearson Development Corporation. It required Mr. Nixon to choose arbitrarily the standard that would support criticism and to interpret "could well appear to be in excess of that required in today's market," as meaning "too high." Mr. Nixon did not hesitate, however. He formed an opinion.

The fact that Mr. Nixon arrived at an unqualified opinion becomes even more striking when his views are examined in relation to the 18 November draft of the Crosbie report which we have had an opportunity to review. In this draft, Mr. Crosbie's conclusion about the rate of return to the developer was that "a pretax compounded rate of return of 23% to the providers of equity may not be unreasonable."⁴⁹⁰ Interestingly, a working draft of the Nixon report, also dated 18 November, describes the return to the developer as unconscionably high over the life of the Pearson agreements.⁴⁹¹ This conclusion prevailed in the final drafts of both the Nixon report and Mr. Crosbie's report to Mr. Nixon, leaving us to wonder whether Mr. Nixon's opinion was based on the Crosbie report, or the reverse.

We must note that, during our hearings, Mr. Crosbie provided us with an additional analysis, performed after the cancellation of the deal, presumably to bolster what may have been recognized as a fragile case. This analysis did little more than demonstrate the obvious; for example, that a lower rate of return to the developer could have permitted significantly higher returns to the government⁴⁹². The pattern of ambiguity established in the earlier Crosbie report was maintained: "Based on our analysis, it would appear that the government should perhaps well have been able to achieve significantly more than they did"⁴⁹³.

490 See *Proceedings*, 30:78

491 See *Proceedings*, 30:79-80

492 See *Proceedings*, 27:20.

493 See *Proceedings*, 27:22.

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Our conclusion is different. We are not persuaded. A generous view of the Crosbie findings is that they provided Mr. Nixon with a reason to recommend further study of the matter, but nothing more.

We note, as well, that Mr. Nixon's findings are not supported in the position now taken by the federal government itself. The government is arguing before the Ontario Court adjudicating a suit brought against it by the developer that, based on sworn affidavits by Mr. Desmarais, the return to the developer would have been negligible, and that there is therefore no need to provide the developer with compensation for the cancellation of the deal.

(x) Passenger Diversion in 75 Km Radius

Mr. Nixon objects to the 33 million passenger diversion guarantee, on the grounds that "information I received strongly suggested that pressure for such alleviation would commence when a 30 million per year figure was reached"⁴⁹⁴. The government's inability to divert passengers to airports within a 75 kilometre radius from Pearson unless traffic at Pearson remained at over 33 million passengers per year is portrayed as a needless policy constraint, which could create overcrowding at Pearson Airport and underdevelopment at nearby airports.

As we have seen, government negotiators recognized that a diversion guarantee was a legitimate protection for developers. Without such a protection, developers would have had to assume all risks created by the possibility that a future government might expand one or more of the dozen airports within a 75 kilometre radius of Pearson Airport, or develop the Pickering lands, and drastically reduce traffic and revenues at Pearson by reallocating traffic. It was also recognized that a passenger diversion guarantee would assist the developers in obtaining financing, and strengthen their case for favourable rates. **The issue was what a reasonable diversion threshold would be, not whether there should be one. It is noteworthy that the Nixon report shares this understanding of the issue: it does not question the need for some form of protection for the developer against diversions of traffic.**

First of all, our evidence conclusively refutes the suggestion that a passenger diversion guarantee at Pearson would have prevented development needed at nearby airports. A Transport Canada briefing document indicates that the passenger volume at the four other airports in the Toronto area as of 1993 was 285,000, and the capacity of these airports was 1.1 million. There was thus considerable room for passenger volume growth before further development would be required at these airports. Had this point been reached before volume at Pearson exceeded 33 million, according to the Department, the provision allowing

⁴⁹⁴ See *Proceedings*, 25:13.

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diversions of up to 1.5 million passengers away from Pearson Airport ensured that any needed expansion at other airports could occur. The conclusion in the briefing paper is that: "growth at the above noted sites would have to increase by approximately 1,000 % in the next ten years for the diversion clause to be of concern." This paper was provided by Mr. Rowat to Mr. Nixon, but the Nixon report shows no sign that it was considered.

The Nixon report also provides no direct evidence in support of the contention that traffic levels over 30 million passengers per year might cause overcrowding at Pearson, and Mr. Goudge's comments during our hearings suggest that opinions on this issue were not sought from qualified departmental officials. The Nixon report does, however, refer to "staff opinion" in the submission considered by Treasury Board in August 1993.

Access to the Treasury Board submission has been denied to us on the grounds that Treasury Board submissions are cabinet confidences. We can, however, suggest that this opinion would need to be viewed in the context of the role of the Treasury Board Secretariat. As we have seen, the Secretariat develops internal challenges to departmental proposals, and provides Ministers with suggested questions and issues in order to assist them in scrutinizing proposals effectively.

Our extensive sworn testimony from public officials refutes the allegations which have been publicly ascribed to the Treasury Board submission and, in particular, the view that overcrowding of the airport would have become a problem above the threshold of thirty million passengers per year⁴⁹⁵. The negotiating "black book" developed in late June to guide the remaining negotiations, which presumably reflects the views of qualified departmental officials on the capacity of the airport, maps out a number of options for protecting the developer against major diversions of passengers away from the airport. The options identified are a flat 33 million passengers per year guarantee; a 28-30-million passenger per year guarantee, with government entitlement to divert being conditional upon capacity or level of service problems between this threshold and one of a 33 million passengers per year; and a threshold of 33 million passenger per year which could be removed, by the government, upon the release to the developer of an additional package of land (Area 4). In these options, the threshold of 33 million passengers per year figures prominently. It is preposterous to suppose that government negotiators would have mapped out their bargaining position based on a passenger volume threshold that they believed would cause problems.

According to our testimony, the capacity of the three Pearson terminals in the early '90s was in the order of 28 million. It must be recognized that, in the words of the official who provided the estimate, "capacity is very much a subjective thing"⁴⁹⁶. While the central

495 See *Proceedings*, 29:88.

496 See *Proceedings*, 6:22.

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purpose of the Pearson agreements was to modernize the terminals, the evidence suggests that they would have increased capacity moderately, as a result of improved overall efficiency and the addition of two new gates. Reflecting this, a departmental official referred during our 23 October 1995 hearing to a post-redevelopment capacity envelope of 28 to 33 million passengers per year. The 33 million passenger diversion threshold thus seems reasonable, especially when it is recognized that the agreements permitted diversions of up to 1.5 million passengers per year below the threshold, before compensation to the developers would be required.

The diversion threshold recommended by negotiators from the two sides, and ultimately incorporated in the agreements, necessarily reflected the give-and-take required by negotiations. It is noteworthy, however, that Pearson Development Corporation had initially sought a threshold of 39 million passengers. The 33 million passenger threshold incorporated in the agreements demonstrates that government negotiators successfully lowered the figure to reflect the bottom lines they had established before negotiations began.

Our conclusion is that the diversion threshold sought and achieved by the Government reflected a reasonable assessment of the capacities of the Airport after redevelopment and did not threaten progress at nearby airports. Neither the Nixon report nor our evidence provide any basis for Mr. Nixon's suspicions.

3. The Most Significant Issue

Mr. Nixon singled out one "leading issue," indicating that "more than anything else this is a matter that has concerned me": the circumstances under which the Pearson agreements were concluded. The emphasis on the special importance of this primary issue was repeated in Mr. Nixon's description of it during our hearings, when it was introduced with the phrase: "However, most significant to me..."⁴⁹⁷.

We note, however, that the Nixon report gives no indication that special significance was attributed to what had become, by the time of our hearings, Mr. Nixon's primary complaint. The language of the report (which was otherwise faithfully reproduced by Mr. Nixon with respect to this issue during our hearings) is as follows:

Finally, the concluding of this transaction at Prime Ministerial direction in the midst of an election campaign where this issue was controversial, in my view flies in the face of normal and honourable democratic practice. It is a well-known and carefully observed tradition that when governments dissolve Parliament they must accept a restricted power of decision-making during the election period. Certainly the closing of a transaction of significant financial

497 See *Proceedings*, 25:11.

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importance, sealing for 57 years the privatization of a major public asset should not have been entered into during an election campaign⁴⁹⁸.

As with Mr. Nixon's other major objections, the language he employed to express his views creates difficulties in determining their precise basis. His objection to the concluding of the agreements during the election campaign does not actually refer to a constitutional convention, although references to "honourable democratic practice" and apparently prescriptive "traditions" strongly suggest that this is what he had in mind.

Mr. Nixon's views on the subject of constitutional conventions did not benefit from the advice of any academics or other specialists on this matter, nor were they justified with any references to such authorities⁴⁹⁹. They appear to be simply statements of personal conviction. As we have already observed, however, personal convictions, no matter how strongly felt, are not constitutional conventions.

Our own findings on the issue of unwritten constitutional conventions provide no basis for Mr. Nixon's views. Discussions with academic authorities confirmed that there is a convention applying to government behaviour following defeat at the polls or in Parliament. However, we found no evidence of a convention that restricts governments undefeated in Parliament in what they can do during an election period. Indeed, the convention is that they continue to have the duty and obligation to govern in this period.

Furthermore, according to the one academic authority who argued in favour of a constitutional convention restricting government action during the election period, this convention would only apply if the concluding of the Pearson agreements was an act going beyond "routine matters of administration."⁵⁰⁰ Unless the concluding of the Pearson deal can be characterized in this way, it is not even a potential violation of the alleged constitutional convention which our evidence has led us to reject.

Mr. Nixon's apparent assumption that what he describes as the "closing of a transaction of significant financial importance" qualifies as a matter beyond routine administration is highly questionable. As he recognizes, it was the closing of an agreement which had already been reached, before the election was called. As our evidence establishes, the closing date had itself been agreed between public officials and the developers back in July of 1993, and the substantive agreements were reached in August with Treasury Board and Cabinet approval. Had substantive changes occurred after August, a further submission

498 Report, p. 8.

499 See *Proceedings*, 25:45-46.

500 See Chapter V, *Observations and Conclusions*.

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to Treasury Board would have been required, and our witnesses have unanimously testified that this was not necessary.

As Minister Corbeil described the events of October 1993, all that occurred was the routine signing of legal documents which had been prepared by officials during September, in order to conclude the agreements reached in August. It was not the concluding but the refusal to conclude which would, at this juncture, have gone beyond the realm of routine administration. In our view, if a constitutional convention prohibiting significant decisions had applied to the government on October 7 1993, it would have required the concluding of the deal rather than a decision not to conclude it.

It could still be argued that, while the concluding of the agreements during an election campaign was entirely proper, it was politically imprudent, given the existence of significant public controversy. This view was expressed by academics with whom we consulted⁵⁰¹ but reflects a highly political judgment which, in our opinion, lies well outside the fields of technical expertise of our academic panel. However, it provides an alternative basis on which Mr. Nixon's objection might rest.

The view that concluding the deal was politically imprudent is, however, highly dubious. Political controversy arose during the election campaign because individuals with a personal stake in the formation of a Toronto Local Airport Authority went to the media, and because the then Leader of the Opposition, Jean Chrétien, was predictably in his capacity as Opposition Leader, criticizing the government. To argue that the government should have capitulated to this criticism and refused to comply with a closing date adopted in July 1993 comes perilously close to arguing that it is the opposition political parties that should govern during the pre-election period. The constitutional convention, however, is that it remains the government's obligation and duty to continue to govern after the Writs of Election are issued.

Such an argument also ignores the serious practical consequences which would have been triggered by a decision, on the part of the government, not to conclude the final agreements. Unless the developers could have been persuaded to voluntarily postpone the deal, which was the only alternative suggested by officials, the developers would have taken the government to court.

The question of liability of the parties, one to the other, as they proceeded along the path of contract negotiations was raised at various times during our hearings. Both Mrs. Bourgon and Mr. Rowat referred to "increasing liability at every stage."

Indeed, it could be argued that during August and September 1993 the parties were in the position described by Professor G.H.L. Fridman, an authority on contract law, in *The*

501 See *Proceedings*, 24:42.

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Law of Contract in Canada (Third Edition, Toronto, Carswell, 1994, p. 23). Pearson Development Corporation and the Government of Canada may be described as having "reached a stage in their negotiations in respect of which it could be said that they had shown not only an intent to be bound together, but the nature, extent and manner of their being bound so as to give rise to a legally recognizable and enforceable contract."

The decision to conclude the agreements on 7 October 1993 was entirely proper. It respected the closing date agreed upon by government officials and the developer in July 1993 and avoided costs to the Canadian taxpayer that would have been incurred had a decision been made to refrain from signing.

What occurred on 7 October 1993 was not an attempt to ram the Pearson deal through before a change of government. It was the completion, on its long-scheduled closing date, of a protracted process in which the critical decisions had all been made well before the issue of the Writs of Election.

In our view, Mr. Nixon's opinion expresses a highly personal reaction predominantly reflecting the intensely partisan feelings aroused during election campaigns. It is not supported by any constitutional convention recognized in Canada, in contract law, or by reasonable considerations of political prudence.

4. The Nixon Priorities

We asked Mr. Nixon, during our hearings, to prioritize the various issues raised in his report in order to rectify what we view to be a serious omission in the report. The report provides no indication of the relative weight of the various objections raised to the Pearson agreements and the process which produced them. It simply declares an overall recommendation after reciting a heterogenous collection of complaints, some of them about the substance of the deal, some about the process, and some (as we have demonstrated) not clearly about either.

The absence of attention to priorities reflects, in part, an absence of attention to clear standards. Nowhere in the report does Mr. Nixon provide a clear statement of the standards which he required the Pearson agreements to meet. There are no suggestions with respect to the standards which an incoming government might reasonably employ in reviewing the activities of its predecessor, and particularly in making decisions having such extensive implications as the decision to cancel these agreements. His report provides no clear indication as to which of his allegations are of major importance and which are relatively incidental, and no indication of how he determined when the overall weight of his findings became sufficient to warrant a recommendation to cancel. After reading his findings and conclusions and, we would add, exploring this issue with him during several days of hearings, we remain mystified as to the precise connection between what Mr. Nixon found, or thought he found, and what he recommended.

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If anything, Mr. Nixon's comments during the hearings deepened our puzzlement. As has been seen, Mr. Nixon's statement of priorities indicated that, if any of his concerns was decisive in the decision to recommend cancellation, it was the concluding of the agreements during the election campaign, at the direction of the Prime Minister and in circumstances of political controversy.

However, even if a clear constitutional convention had been violated by the concluding of the agreements in October of 1993, the appropriate remedy would not have been cancellation. As we have argued at the outset of this report, cancellation is only an appropriate remedy if those who would be affected by it deserve to be punished, or if the substance of an agreement is so clearly contrary to the public interest that the agreement requires termination on these grounds. If a constitutional convention had been violated, however, the parties guilty of its deliberate or accidental disregard would have been the Prime Minister and Minister of Transport, not the developers, travelling public and Canadian taxpayers who have borne the brunt of the punishment Mr. Nixon recommended.

In the absence of a violation of a constitutional convention, and we have concluded there is no violation, then surely the date on which the contracts were concluded is irrelevant. The contracts are either adequate or they are not. Mr. Nixon, by selecting the closing date as the most important basis for his cancellation recommendation, is implicitly acknowledging the adequacy of the contracts.

Our conclusion, based on Mr. Nixon's account of his priorities, is that what he viewed as his most important complaint about the Pearson agreements, would not have supported a recommendation to cancel them.

5. Concluding Remarks

A) The Nixon Report

Mr. Nixon told us several times during our hearings that he conceived his task to be, "the provision of personal opinion and advice...to the Prime Minister," to assist with decision-making about the Pearson agreements. Clearly, the review he conducted allowed him to form an opinion, and to provide advice.

In our view, however, his task was not merely to form an opinion, it was intended that he form a responsible opinion, on which the Prime Minister of Canada could safely rely in deciding the fate of an \$750-million development project reflecting literally years of work by a large team of publicly paid officials, as well as the developers, and having implications for airlines, passengers, the economy of the region of Toronto and, ultimately, the credibility of the government in future business deals.

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Mr. Nixon's conclusions are almost entirely without foundation, as they are based on unsupported aspersions cast by disaffected individuals with the strongest motivation to seek him out and criticize the Pearson project. The conclusions are, furthermore, remarkably consistent in the indirectness and imprecision of their language and in the apparent absence of careful thought about the standards they reflect. They do not deserve to be described as "investigatory findings" or even, in Mr. Nixon's word, "opinions." They are merely impressions, masquerading as conclusions.

Leaving them aside, and considering solely the process employed by the review, we are left with serious concerns about Mr. Nixon's judgment in providing firm advice to the Prime Minister. The time-frame in which he worked, and the information and analysis he obtained, were demonstrably inadequate as a basis for unqualified conclusions about an arrangement as complex and important as the Pearson redevelopment deal.

Furthermore, the vagueness of the standards which Mr. Nixon applied to the Pearson agreements enabled him to avoid a serious consideration of the various options available to the government, and careful thought about which was most appropriate as a remedy for the flaws he perceived.

The possibility that the government could seek to renegotiate any aspects of the agreements with which it was not satisfied was presented to Mr. Nixon as an option in a memorandum provided by Mr. Rowat at the outset of the Nixon review. This option would have been a more appropriate response to Mr. Nixon's findings than a recommendation to cancel the entire agreement. By cancelling the agreement, the government brought to a halt a redevelopment program which Mr. Nixon himself acknowledged was extremely attractive, postponed the solving of problems in the terminals, and punished a range of people who have no connection with what Mr. Nixon claims was the central flaw, the concluding of the agreements during an election campaign.

Mr. Nixon would have served his Prime Minister, and his country, better had he recognized the limitations in the time-frame set for his review. A recommendation for further study to enable a responsible decision would, we believe, have opened the door to a more careful consideration of the whole issue. The substantive errors upon which Mr. Nixon's recommendation was based would have been revealed before it was too late. There would have been time, as well, for careful thought about the alternative options available to the government, including the possibility of renegotiating individual provisions of the agreements so as to obtain specific improvements.

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B) The Cancellation Decision

Prime Minister Chrétien clearly placed enormous reliance on Mr. Nixon's judgment, since he announced the cancellation of the Pearson agreements only four days after receiving the Nixon report, and provided no other basis for this decision.

As a result of this decision, several important and highly desirable things did not happen. There was no development of Terminals 1 and 2, the need for which was almost universally recognized, and the window of opportunity to develop the terminals in advance of anticipated passenger demand was closed.

An innovative private sector-public sector partnership model, which would have been immediately relevant in the era of reinventing government, was not established.

A globally recognized Canadian participant in the airport development and operations business was not created; with consequences in terms of lost opportunities and revenues which cannot accurately be estimated.

The anticipated employment of up to 1,000 people on site during the redevelopment process, the still-needed shot in the arm to the Toronto construction industry in the fall of 1993, and the estimated thousands of indirect jobs which would have been created in the Toronto region, all failed to materialize.

At the same time, the cancellation had a number of undesirable effects. First of all, the developers launched legal proceedings against the federal government, triggering the immediate spending of taxpayers' dollars for the purposes of legal defence and creating the possibility of further spending related to legal settlements.

Second, the government tabled draconian legislation which would remove the rights of the developers to seek normal redress through the courts and, if enacted, provide a precedent that could cast a permanent chill over relations between the government and commercial partners.

Third, the Matthews Group went out of business; some 750 people lost their jobs and many remained unemployed as of 13 September 1995, the date on which Mr. Don Matthews appeared before us.

This is a dismal ledger. Ostensibly made to uphold the public interest, the decision to cancel the Pearson agreements has achieved nothing positive for Canadians. We think it reflects an unaccountable lapse in judgement.

“Emotions stemming from electoral campaigns are a seriously inadequate basis for responsibly addressing the complexities of sound public policy-making”

Special Senate Inquiry into
the Pearson Airport Agreements

In the course of our hearings, we have developed a series of findings and preliminary conclusions. These have been set out in the final section of each chapter of this report, and are gathered together immediately below. In addition, we have supplemented these conclusions where appropriate.

These findings and preliminary conclusions provide the basis for our main conclusions which address the fundamental issues which have been raised about the Pearson agreements, and for the recommendations which follow.

The Process

1) We conclude that there is no evidence to contradict the unanimous affirmation, by participants, of the complete integrity of the process from which the Pearson agreements emerged, beginning in 1990 with the decision to seek private sector involvement in redeveloping the terminals and ending in late 1993 with the completion of negotiations, Cabinet approval and the conclusion of the agreements.

2) We conclude that at all stages, the safeguards which ensure that private interests do not override the public interest as perceived by the democratically elected representatives of the people were fully operative and were in no way compromised in all aspects of the Pearson redevelopment process.

The Policy Framework

3) We conclude that the 1987 airports devolution policy, and the new focus on commercial orientation and private sector involvement, did more than provide an imaginative solution to problems of the mid-eighties relating to Transport Canada's role in managing airports. It anticipated broader initiatives of the nineties, including the program review of 1994-5 with its comprehensive attempt to more tightly focus the role of government in the economy.

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4) We conclude the public servants who crafted the emerging airports policy during this period should feel a sense of real accomplishment at having implemented the vitally important first steps in a new direction for this policy sector. Equally, the public policy vision which provided guidance to officials should be recognized for what it was, a prescient anticipation of the realities of the nineties.

5) We conclude that the leasing of T1 and T2 to the Private Sector, requiring the private sector to redevelop the terminals, conformed to the policy of the federal government.

The Decision to Seek Private Sector Involvement

6) We conclude that the demand for terminal redevelopment, as expressed to the Minister by an extensive range of airport users and beneficiaries, was urgent and the government's decision to proceed was sound.

7) We conclude it would have been irresponsible to refrain from even the first steps towards redevelopment, on the grounds that there were some signs of an emerging interest among Toronto municipalities in establishing a mechanism to manage the airport, including terminals.

8) We conclude that a refusal to act in 1990 by the Minister, and wait for the formation of a Local Airport Authority, would have left him open to justifiable accusations of ignoring the expressed needs of the Toronto Region to modernize Terminals 1 and 2.

9) We conclude that a course of deliberate inaction in 1990 would have gone directly against the spirit of the 1987 policy, which was precisely to release airports from thraldom to centralized government management and let them respond directly to local needs and the requirements of the travelling public.

10) We conclude that we are in agreement with the witnesses from Air Canada, who stated that 1993-94 was the ideal period during which to commence the redevelopment of Terminals 1 and 2.

Developing and Releasing the Request For Proposals

11) We conclude that the Government benefitted from its experience related to the construction of Terminal 3, by the private sector. This was experience, which it transferred to the T1, T2, redevelopment process.

12) We conclude that because the government sought input from all those who were interested in the content and makeup of the Request for Proposals, concerns such as those expressed by the airlines were fully and satisfactorily addressed in the Request For

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Proposals, as is confirmed by the eventual ratification of the Pearson agreements by Air Canada.

13) We conclude that the case for delaying redevelopment in order to accommodate advocates of a Toronto local airport authority was no stronger in 1992 than it had been in 1990. If anything, it was weaker, since the Request For Proposals provided tangible evidence that terminal redevelopment would not preclude the establishment of a local airport authority, and indeed could eventually be managed by such an authority.

14) We conclude that the technical requirements of the Request For Proposals reflect the complete success of the Minister and officials in maximizing the public interest through a fair competitive process. Considered collectively, the technical requirements of the Request For Proposals challenged the private sector to provide the Government, and Canadians, with innovative solutions to the need for modernization of the Pearson terminals and to participate in a fair and open competition to determine which proposal would be selected.

15) We conclude that as a result of the long lead time between the announcement that an RFP would be called and the issuance of the RFP (some 17 months), and the fact that those capable of carrying out such a project were well known, because of the T3 contract, it was deemed unnecessary to go through an expression of interest stage, and the time to respond could be set at 90 days, (although later expanded to 127 days) the norm in such procedures.

16) We conclude that the Request For Proposals was scrupulously fair. Indeed, as a concrete example of the fresh thinking called for by the 1987 airports management policy, it was exemplary.

The Decision to Announce a Best Overall Acceptable Proposal

17) We conclude that between 16 March 1992 and 7 December 1992 the Department of Transport administered an evaluation process of impeccable thoroughness, and note, the evaluation team presented a unanimous report.

18) We conclude that this evaluation process was rigorous in all aspects and further note, it was supervised by Price Waterhouse, audited by the accounting firm of Raymond, Chabot, Martin and Paré and the financial plans submitted by the proponents were scrutinized by financial experts from Richardson, Greenshields.

19) We conclude that the announcement of a Best Overall Acceptable Proposal in December 1992 was not merely consistent with the public interest, but required by it.

20) We conclude that the only thing that would have made this announcement inappropriate would have been a Government decision, against the considerations we review in Chapter IV, to abort the entire process and do nothing about the terminals.

Chapter VII - Findings, Conclusions and Recommendations

The Negotiation and Concluding of the Agreements

The Local Airport Authority

21) We conclude that it would have been irresponsible to delay redevelopment in 1993, in the hope that the political problems which beset Toronto's local airport initiative would soon be resolved. To do so would have been to substitute wishful thinking for effective action to address the problems in Terminals 1 and 2 at Pearson Airport.

22) We conclude that the position taken by the government, that the City in which the airport is located, Mississauga, had to confirm its unconditional agreement with the creation of an LAA, prior to one being recognized for the Greater Toronto Area was sound.

23) We conclude, that from 1989 to October 7, 1993, there was no Local Airport Authority established for the Greater Toronto Area to which the Pearson Airport could have been transferred.

The Merger

24) We conclude, that the decision to explore the synergies involved in the amalgamation of the efforts of the two bidders was theirs, and theirs alone.

25) We conclude, that there is absolutely no evidence of collusion between the proponents prior to December 7, 1992.

26) We conclude, that the merger of the two proponents was not directed by anyone in government or in the public service.

Liability

27) We conclude, as have many of our witnesses, that with the passing of each significant milestone in the negotiation process and in the signing, concluding, and releasing of the contracts from escrow, the exposure of the parties to legal liability, if either one of them had withdrawn, would have been real and significant.

28) We conclude that by the end of August, 1993, if not before, the parties had reached a stage in their negotiations that their intent to be bound together gave rise to a legally recognizable and enforceable contract.

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Closing the Transaction

29) We conclude, that Government decision-making during the period between the issue of the Writs of Election and the vote was not subject to a restrictive constitutional convention. The Prime Minister and Minister of Transport committed no constitutional infraction in the fall of 1993 when they carried out their respective roles in the closing of the Pearson Airport project. On the contrary, they merely performed their duty to continue to govern until the will of the people had been expressed on election day.

Lobbyists

30) We conclude that while lobbyists were active on this file, their major efforts were related to the gathering and dissemination of information to their clients.

31) We conclude that with all of the witnesses from the private and public sector, who were involved in the Pearson process that lobbyist's actual influence over the selection, negotiation, and decision-making process was nil.

Rate of Return

32) We conclude, that the rate of return to the developers and to the Crown under the Pearson contracts was fair, given the risks involved, and the investment required for this project.

The Project

33) We conclude, that given these circumstances, the Pearson contracts providing \$750 million of private sector investment to accomplish redevelopment objectives, which would otherwise have had to be met with public spending, were concluded in the best interests of all Canadians.

34) We conclude, that the evidence leaves no room for doubt that the negotiators of the Pearson development agreements faced an enormously difficult task, given the complexity of the project and the other circumstances we have detailed above. They ensured that the original objectives of the government were met, and obtained what could have been lasting value for Canadian taxpayers in the redevelopment of Terminals 1 and 2.

Chapter VII - Findings, Conclusions and Recommendations

The Cancellation of the Agreements

The Nixon Report

35) We conclude, that the Nixon Report is without foundation, and amounts to unsupported aspersions cast by those disaffected individuals who had the strongest motivation to seek out its author. It is furthermore, remarkably consistent in its ambiguity of language and in the apparent absence of careful thought about the standards which it reflects. It does not deserve to be described as an investigation in the accepted sense of the word. It is a collection of impressions, masquerading as conclusions.

36) We conclude, that given the process he employed by the review, we are left with serious concerns about Mr. Nixon's judgement in providing firm advice to the Prime Minister. The time-frame in which he worked, and the information and analysis he obtained, were demonstrably inadequate as a basis for unqualified conclusions about an arrangement as complex and important as the Pearson redevelopment project.

37) We conclude, that Mr. Nixon would have served his Prime Minister, and his country, better if he had recognized the limitations imposed upon him by the time-frame set for his review. A recommendation that further study was needed in order to enable a responsible decision would, we believe, have opened the door to a more careful consideration of the whole issue. The substantive errors upon which Mr. Nixon's recommendation was based would have been revealed before it was too late. There would have been time, as well, for careful thought about the alternative options available to the government, including the possibility of renegotiating individual provisions of the agreements if specific improvements were thought necessary.

The Cancellation Decision

38) We conclude, that the decision to cancel the Pearson agreements has achieved nothing positive for Canadians, and has involved some serious costs. We think it reflects an unaccountable lapse in judgement by the Government of Canada.

Chapter VII - Findings, Conclusions and Recommendations

Main Conclusions and Recommendations

Our inquiry into the cancellation of the Pearson Airport agreements has left us with four fundamental conclusions, reflecting the standards that we have argued are appropriate to this purpose.

First, we have found no evidence in relation to the redevelopment of the terminals of Pearson Airport, that any public officials knowingly set aside what they believed to be the public interest in order to favour a private interest, at any point during the process or before its inception.

Second, we have found no evidence that political pressures or other circumstances compromised the process through which the Pearson agreements were developed, or that the elected and appointed public officials and private sector participants involved failed to perform their respective duties to a high professional standard.

1) We conclude, that the Nixon Report's insinuations with respect to the preferential treatment of the Paxport proposal and the Paxport consortium, constitute an unwarranted slur on the professional competence of the many individuals who worked to bring the Pearson Agreements about.

Third, we have found no reason to call into question the underlying public policy thrust expressed in the Pearson agreements. On the contrary, we believe they involved an imaginative use of private sector capabilities that would have simultaneously realized private sector and public sector objectives.

2) We conclude, that the airport devolution policy initially established by the government in 1987, including its specific provisions for private sector involvement in airports was appropriate, and applaud the fact that the Canadian Airport Authority policy of the current government retains this philosophy.

Fourth, our examination of the full process which led to the Pearson agreements has revealed a story of at times Byzantine complexity, displaying a normal quota of human fallibility and limitation. This does not, however, establish the existence of the sinister conspiracy imagined by the most vocal critics of the project, including Mr. Nixon.

3) We conclude, that the Senate inquiry into the process and the agreements it produced has revealed an utterly routine course of events, consisting essentially of an arduous attempt on the part of all public officials, in good faith, to serve the interests of Canadians.

4) We conclude, that the negative impact of the cancellation of the Pearson contracts has created a dismal ledger: no redevelopment of Terminals 1 and 2, jobs

Chapter VII - Findings, Conclusions and Recommendations

either lost or not created, legal proceedings commenced against the Crown, lost opportunity for public and private sector cooperation and lost revenues to the Crown. The decision to cancel has achieved nothing positive for Canadians. It reflects an unacceptable lapse in judgement by the Government of Canada prompted by immediate political gain and has caused negative long term economic and social consequences.

We recommend that the detailed story of the Pearson Airport agreements be put to constructive use, within the Department of Transport and the Public Service and, more broadly, by students of public policy and business-government relations. We hope, in addition, that it can serve as a cautionary tale for politicians.

We recommend that all political decision-makers, of whatever party, recognize the essential lesson of the Pearson experience. Emotions stemming from electoral campaigns are a seriously inadequate basis for responsibly addressing the complexities of public policy-making. Furthermore, where campaign commitments are made to review major public policy decisions of a previous government, this should be done with rigorous detachment from any partisan emotions which may have precipitated the review.

SPECIAL SENATE COMMITTEE ON THE PEARSON AIRPORT AGREEMENTS

MINORITY REPORT

"What comes through to all sorts of people critical of our government is some sort of a quick pay off to friends who want to develop airports and it doesn't taste well and it doesn't sound well and it leaves all sorts of suspicions and it doesn't add up or balance."

- Don Blenkarn, Conservative Member of Parliament for Mississauga South, writing to Transport Minister Jean Corbeil, March 13, 1992

"The hard facts of the case must therefore be that [the Right Honourable Kim Campbell] chose to authorize the signing of the Pearson Airport agreements at a time when she knew that she would not be able to take responsibility for the consequences of that decision. And that looks very close to me like the work of a government which has already lost the moral authority to govern. To say that her decision was a constitutionally inappropriate exercise of power is, in my view, to put it mildly, but in the context of our customs and those of other parliamentary systems it, in my view, is also enough to justify whatever steps have to be taken to terminate the agreement."

- Professor John Wilson, professor of political science at the University of Waterloo, testifying before the Special Senate Committee on the Pearson Airport Agreements, September 25, 1995.

I. Introduction

On May 4, 1995, the Special Senate Committee on the Pearson Airport Agreements was formed with the following mandate:

"That a special committee of the Senate be appointed to examine and report upon all matters concerning the policies and negotiations leading up to, and including, the agreements respecting the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport and the circumstances relating to the cancellation thereof." [Minutes of Proceedings of the Senate, May 4, 1995, 1590-92]

To fulfill this mandate, the Committee heard testimony from over 65 witnesses, and reviewed thousands of pages of documents. This testimony, and especially the evidence of the contemporaneous documents, demonstrated conclusively that the Pearson Airport deal was not in the best interests of the country, both in its substantive terms and because of the process by which it was brought into being.

From its inception, the redevelopment of Terminals 1 and 2 at Pearson Airport was driven by private developers, and in particular by Paxport Inc., a consortium headed by Mr. Don Matthews and his son, Mr. Jack Matthews.¹ Neither Don Matthews nor his son had any experience in developing or operating airports. Mr. Jack Matthews openly admitted that the first question people would ask him in meetings was, "Jack, what business do you have in the airport business?" And the only answer he could give was to point to his unsuccessful attempt to win the Terminal 3 contracts.²

Messrs. Matthews hired Mr. Ray Hession, a former high-ranking public servant, to serve as President of Paxport. In what no doubt will become a model case-study on lobbying for courses on business-government relations, Mr. Hession undertook first to persuade the political, business and public service communities of the need for immediate redevelopment of Terminals 1 and 2, and then to present Paxport as the best solution.

Mr. Hession was successful; Paxport's proposal was selected by the Government for the redevelopment project, even though it was known, right up to the Prime Minister, that Paxport could very well discover in "a matter of weeks ... that their proposal is not workable

¹ Several witnesses spoke eloquently of the serious problems at Pearson. However, there was no evidence of any need or desire to address those problems outside the general Government policy of using Local Airport Authorities to develop and to operate airports, until after Mr. Hession's campaign to demonstrate the pressing need was launched.

² Testimony of Mr. Jack Matthews, *Proceedings of the Special Senate Committee on Pearson Airport Agreements*, hereinafter cited as "Committee Transcript," Thursday, September 21, 1995, Issue No. 22, 22:130.

under current circumstances in the airline industry.³ That is, in fact, what occurred. Paxport could not finance the project.

Within days of having had its proposal selected, and so winning the right to negotiate a contract to redevelop Terminals 1 and 2, Paxport was discussing a merger with its only competitor for the project, the Airport Terminals Development Group.⁴ This merger was finalized just five weeks later. Senator Finlay MacDonald, the Chairman of the Senate Committee on the Pearson Airport Agreements, expressed surprise at what he termed "the almost indecent short length of time between Paxport becoming a winner and a merger taking place."⁵

This inquiry into the Pearson Airport Agreements revealed to the public how Government worked under the direction of the Right Hon. Brian Mulroney. Lobbyists, to borrow the words of a journalist who sat through many of the hearings, "swarmed" over senior levels of government in their determination to win the contract for their client.⁶ The Committee learned that it was "not ... unusual" for a company like Paxport to receive debriefings from senior political staffers to Cabinet ministers on cabinet committee meetings⁷ -- and the Committee saw concrete evidence of this in a report from a lobbyist to Paxport's President that provided a "full debriefing" on a Cabinet Priorities and Planning Committee meeting.

The Committee heard how the Prime Minister of Canada, as a result of an approach made at a social function, asked the Clerk of the Privy Council, the Government's most senior public servant, to try to arrange things "so that everybody could get a piece of the action."⁸

³ Memorandum for the Prime Minister from Mr. Glen Shortliffe, Clerk of the Privy Council, dated December 4, 1992, Committee Doc. 002184.

⁴ The Airport Terminals Development Group ("ATDG"), which was Paxport's competitor at that time, was a consortium controlled by the Claridge Group, a group of companies, including Claridge Properties Ltd., Claridge Holdings Inc., and others, controlled, directly or indirectly, by Charles Bronfman. For convenience, we refer to these companies in this report as we did throughout the hearings, simply as "Claridge." (At a certain point, ATDG dropped out of the picture, so that the final merger was between Paxport and the Claridge Group.)

⁵ *Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:63.

⁶ Murray Campbell, "Pearson lobbyists had list of politicians to target: Memos indicate four firms had battle plans to gain influence," *Globe & Mail*, August 24, 1995, p. A6.

⁷ Testimony of Mr. Ray Hession, former President of Paxport Inc., *Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:83.

⁸ Testimony of Mr. Glen Shortliffe, then Clerk of the Privy Council, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:65. As will be seen, this occurred before the merger discussions began.

The Committee saw internal Paxport memoranda discussing whether it would be "smart strategy" to have the Prime Minister "push/order" the Hon. Douglas Lewis, then Minister of Transport, to award the redevelopment contract to Paxport unilaterally, without a competition. The Committee heard testimony of \$2.4 million contracts to a lobbyist who was a former senior member of Mr. Mulroney's staff -- contracts which were contingent on this deal going through. The Committee heard testimony of lobbying campaigns that "targeted" high-ranking members of Cabinet, their political staff, officials within the Department of Transport, Members of Parliament, officials in the Privy Council Office and in the Prime Minister's Office. And the Committee saw internal government memoranda that predate the announcement of the winner of the Request for Proposal competition, commenting, "This may be a done deal."⁹

The Committee saw documents evidencing the numerous side deals and non-arms length contracts by which the developers were going to enrich themselves out of Pearson Airport, beyond their profits out of the already rich (23.6% rate of return) redevelopment deal. These documents included a contract to pay \$3.5 million over 10 years to a Matthews Group company, labelled as a "consulting fee", but with no mention of any services, consulting or otherwise, to be provided. The Committee saw a \$3.15 million contract to the parent of another consortium member, to serve as a "consultant" in the management, operation, development and re-development of Terminals 1 and 2. The Committee saw evidence of a \$4 million contract to yet another Matthews Group company, as a promotion fee to try to win other airport development contracts for the consortium internationally. Despite being completely unrelated to Pearson Airport, the money would apparently have been paid from Pearson revenue, somehow as part of the cost of operating the Pearson terminals.

The Committee saw evidence of construction management contracts, architectural and engineering service contracts, and other management contracts, to name just a few -- all adding up to millions of dollars in extra revenue for the T1T2 consortium members. The Committee also saw Government documents that struggled to piece together these contracts, match them to the proper contracting parties, and locate them within the complex web of each consortium member's corporate structure. One such document was aptly entitled, "The Matthews Enigma."¹⁰

The Government gave away any real right to oversee or to limit this self-dealing. It also gave away any real ability to complain if the consortium was not living up to its side of

⁹ Interoffice Memorandum from Mr. Bill Cleevely to six Treasury Board officials, dated November 26, 1992, Committee Doc. 001267.

¹⁰ Committee Doc. 001109.

the deal -- the only remedy the Government had was to step in and take over the airport, something unlikely to occur except in a case of the utmost serious breach. Thus the consortium would have had considerable leeway to bend the rules -- and the lease was for 57 years.

The evidence is clear that the project to privatize Terminals 1 and 2 was launched against the advice of Air Canada, Canadian Airlines International and the rest of the Canadian airline industry. Once launched, the Government employed a process that, it was warned, "could convey the message that the Department is not committed to a fully open and competitive process."¹¹ It was proceeded with against the advice of public servants, and in the face of concerns expressed both openly in Parliament by the Rt. Hon. Jean Chrétien, then leader of the Official Opposition, and privately in correspondence between a Conservative Member of Parliament for Mississauga (where the airport is located) and the Minister of Transport.¹² Late in the negotiations, the Terminal One air carriers sent one final plea to the Minister of Transport and to Paxport, ending: "*Who will remain in business to pay for your extravagant folly?*"¹³

The deal was negotiated by officials "working at a furious pace"¹⁴ to meet a deadline that was imposed by Prime Minister Mulroney so that the deal could be closed before he left office in June, 1993.¹⁵ Internal Government memoranda noted that this pressure for speed in the negotiations gave the consortium "an upper hand in negotiations."¹⁶ Ultimately, the deadline could not be met. The agreements were finally signed in a tumult of public controversy, in the middle of the election campaign, and at the express direction of the Prime Minister, the Rt. Hon. Kim Campbell, acting with what one witness characterized as an unprecedented "reckless disregard for propriety."¹⁷

¹¹ Memorandum dated October 29, 1991 from Mr. Chern Heed, general manager of Pearson Airport, to Mr. Victor Barbeau, quoting comment by Price Waterhouse, Committee Doc. 000639.

¹² Letter from Mr. Don Blenkarn, Member of Parliament for Mississauga South, to the Hon. Jean Corbeil, Minister of Transport, dated March 13, 1992, Committee Doc. 000996.

¹³ Letter from Ms. Carole Pitre, Chairperson, Airline Operators Committee - Terminal One Sub-Committee, to Paxport Inc. dated June 29, 1993, Committee Doc. 001088, italics in original document.

¹⁴ Memorandum from Mr. Robert Fonberg to Mr. Michael Francino, Department of Finance, dated May 17, 1993, Committee Doc. 002072.

¹⁵ Testimony of Mr. Glen Shortliffe, former Clerk of the Privy Council, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:74.

¹⁶ Memorandum from Mr. Robert Fonberg to Mr. Michael Francino, Department of Finance, dated May 17, 1993, Committee Doc. 002072.

¹⁷ Testimony of Professor John Wilson, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:15.

The Committee heard testimony from both the Clerk of the Privy Council and a political science professor at the University of Waterloo that the Government of Canada observes a general rule to act with caution as soon as Parliament is dissolved and an election is underway.¹⁸ Under this "caretaker convention," the Canadian government accepts a "firmly restricted" freedom of decision making, a freedom confined to only routine matters of administration.¹⁹ This rule was not observed in the case of the Pearson Airport deal. The Committee was told that signing the Pearson agreements "was a constitutionally inappropriate exercise of power... [that was] enough to justify whatever steps have to be taken to terminate the agreement."²⁰

These contracts would have established a precedent dangerous to Canada's democratic process, a precedent whereby a government could conclude controversial agreements during an election campaign -- even when it is clear that Government is about to lose. These contracts would have bound the Canadian government to a 57-year lease under terms that, as a matter of responsible business management, were not in the country's best interest. Furthermore, the privatization of Canada's largest, busiest and most profitable airport was inconsistent with the stated Government public policy and the policy which was being applied at all other major airports in Canada.

Was there political manipulation? Absolute proof may be impossible to retrieve. Rules prohibiting disclosure of cabinet documents or advice to ministers, and an understandable reluctance on the part of civil servants to point fingers in public at their former political masters, or to criticize the terms of a deal they themselves negotiated, all combine to enshroud much of this already murky deal, that the Committee was unable to penetrate. But the documentation that was disclosed to the Committee reveals a degree of involvement and direction from the Prime Minister and members of his Cabinet, and their close advisors, that goes far beyond what one would anticipate in any normal commercial transaction.

For these reasons, we support the decision by the Canadian Government to cancel the Pearson Airport Agreements.

¹⁸ Testimony of Jocelyne Bourgon, *Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:57, 59; testimony of Professor John Wilson, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:13.

¹⁹ *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:9.

²⁰ *Ibid*, 24:16.

I. BACKGROUND: POLICY

The Government headed by the Right Hon. Brian Mulroney began with a clear and consistent policy toward the development of the 150 airports then run by the federal government -- which included all the major Canadian airports. Austin Douglas, retired Associate Executive Director, Airports Authority Group of Transport Canada, testified about the evolution of this policy, which began with the Mazankowski Task Force Report in 1986.

That Task Force, headed by the Hon. Don Mazankowski, included representatives from both the public and private sectors. It looked at four options: a private sector option; a Crown corporation option; a local airport authority option ("LAA"); and a Transport Canada Airports Authority Model Option, which was a more sophisticated and commercialized version of what was going on at the time. The report ranked local airport authorities first, and eliminated the private sector option altogether from the recommendations. As Mr. Douglas testified:

"[T]he report said that [the private sector option] was not necessarily the best way, [nor] the most sensitive way of dealing with all the different publics involved in deciding what was best done to stimulate local economic development and meet the interests of all the people who would be most likely to be affected by the airport."

[*Committee Transcript*, Tuesday, July 11, 1995, Issue No. 2, 2:28-29.]

Steps were quickly taken by the Mulroney Government to implement this policy. In the spring of 1987, the Government issued a paper entitled, *A New Policy Concerning A Future Management Framework for Airports in Canada*.²¹ As Mr. Douglas testified, that policy statement did not include the so-called private sector option as an acceptable choice, except insofar as it provided that private sector interests "should be encouraged in every way possible to participate in the actual development opportunities and operation of the airport." [*Committee Transcript*, Tuesday, July 11, 1995, Issue No. 2, 2: 30.] (The private sector role in the construction and operation of Terminal 3 had been contracted for before the Government had formulated its policy in 1987. See: *Committee Transcript*, Tuesday, July 11, 1995, Issue No. 2, 2: 44.)

Mr. Nick Mulder, Deputy Minister of Transport, testified that, "Out of that [1987 policy statement] came the policies, as you are all familiar with, of having local airports authorities established, of which four were negotiated in [the] early 1990s, and even attempts were made in Toronto to set up local airport authorities." (*Committee Transcript*, Tuesday, July 11, 1995, Issue No. 2, 2:15.)

²¹ This was included at Tab G of the Briefing Book prepared for Committee members by the Library of Parliament research team.

In early April 1992, agreements were signed transferring the international airports in Vancouver, Montreal, Edmonton and Calgary to local airport authorities. [See: Transport Canada Press Releases Nos. 56 - 59/92, Committee Doc. 00015.]

Mr. Glen Shortliffe -- formerly Clerk of the Privy Council (1992 - 1994) and Deputy Minister of Transport (May 1988 - October 1990) -- testified that the policy adopted for Toronto marked an exception to the policy applied elsewhere by the Mulroney Government:

"[W]as this a departure from the generally announced LAA policy that had been put out in 1987? Sure it was. Was it a deliberate policy decision by the government of the day? Yes it was. And was it taken to address what was perceived as a crisis at Pearson? Yes, it was." *[Committee Transcript, Thursday, July 13, 1995, Issue No. 4, 4:70, emphasis added.]*

The issue of the readiness of the Toronto LAA to take over Pearson has been hotly disputed in the committee proceedings. The Greater Toronto Regional Airports Authority ("GTRAA") testified that it was as ready and able, or even more ready and able, to take over Pearson as any of the other LAA's that were accepted by the Mulroney Government in the other major Canadian air travel centres. This issue will be considered below.

A different issue concerns the degree to which a crisis actually existed at Pearson, and the degree to which an alleged crisis was used as an excuse to avoid the LAA process, and to adopt an extraordinary "solution," a private sector option for Pearson.

Background: Crisis at Pearson?

Both Mr. Shortliffe and the Hon. Doug Lewis (Minister of Transport, February 1990 - April 1991) testified that a crisis did exist. Mr. Lewis claimed that virtually every day someone brought to his attention the need to "fix Pearson." *[Committee Transcript, Thursday, July 13, 1995, Issue No. 4, 4:4-5.]*

Mr. Shortliffe told much the same story, adding that: "Pearson was a mess. It was a disgrace. And worst of all, it was not working." *[Committee Transcript, Thursday, July 13, 1995, Issue No. 4, 4:64.]*

He told our Committee that in the later 1980's there was a shortage of air traffic controllers, inadequate runways, and terminals that were not up to the job of handling the projected levels of traffic in the years ahead. He described Terminal One as a "one-horse shay which had collapsed," and complained that Terminal Two "was clearly suffering from an inadequacy of gates." *[Committee Transcript, Thursday, July 13, 1995, Issue No. 4, 4:65.]*

In 1989-90 there were problems at Pearson Airport -- nobody has asserted the contrary. The controversy relates to which problems the Government decided to address, and how it proceeded to address those problems. **As will be seen, the final deal at issue in this inquiry did not address the air traffic controller situation, nor did it address the runway problem. No construction would have occurred at Terminal 1 until 1997 at the earliest. There would have been earlier construction at Terminal 2, but no new gates would have been added.**

Moreover, the situation at Pearson changed rapidly with the advent of the recession. As Mr. Gardner Church, former Deputy Minister for the Greater Toronto Area in the Ontario Government, noted, "[D]emand on the airport facilities had dropped dramatically, and the crush from '89 was no longer an issue." But the project continued, on the basis of "extraordinary" flight data that projected the future demand on the airport facilities. [*Committee Transcript*, Tuesday, July 25, 1995, Issue No. 5, 5:21.]

Later, Mr. Church elaborated, explaining that the "extraordinary" flight data used as a basis for the decision to proceed with the private development of the terminals was derived from the unique growth experienced in Toronto in 1986-89 -- "the most extraordinary growth period in the history of the country and by far the most extraordinary growth period in the history of Toronto and Toronto aviation." [*Committee Transcript*, Tuesday, July 25, 1995, Issue No. 5, 5:22.] In fact, the evidence was indisputable that this growth pattern has not continued.

On November 16, 1992, three weeks before the Government announced the selection of Paxport's proposal as the "Best Overall Acceptable Proposal" to redevelop the terminals, Glen Shortliffe, then Clerk of the Privy Council, wrote to Prime Minister Mulroney:

"Transport has identified a number of issues to be considered before proceeding:

- the recession is continuing longer than expected and traffic may decline due to the current airline industry situation so the need for the expanded terminal space has slipped 2 to 3 years. **There is no need to start construction until 1996;**
- it had originally been expected that construction might start next year. Transport's current estimate is now 1994 at the earliest as it will take a minimum of 12 months to negotiate the lease. Paxport will have to negotiate new leases with the carriers and other T1/T2 tenants and arrange financing before signing the lease;

-
- Carriers' costs would double to \$60 million in the first year and increase by a factor of four in ten years. **Air Canada has asked that the redevelopment be postponed.**
 - a Local Airport Authority (LAA) may be established for Pearson. The five regional chairmen, led by Metro Toronto, have written to Mr. Corbeil indicating their intention to proceed with the LAA process. The LAA would assume any lease for T1/T2. **There may be pressure from the province for a postponement until the LAA can be established.** [Memorandum for the Prime Minister from Glen Shortliffe, dated November 16, 1992, Doc. 002188, emphasis added.]

It is clear from the documentation that the urgency to "fix" Pearson -- the "crisis at Pearson" -- had evaporated by the time the proposals were being assessed. Air Canada, the major tenant at Terminal 2, advocated postponing the redevelopment; the cost to the travelling public would quadruple to pay for the redevelopment; and the Government of Ontario wanted to wait until an LAA could be established at Pearson. Notwithstanding all of the above, the Government displayed a single-minded determination: pushing to completion this private sector solution to a problem that did not exist. One can only wonder whether their determination would have been as steady had the recipient been a not-for-profit local airport authority, instead of a private sector entity, whose participants stood to make millions of dollars.

The Status of the Toronto LAA

Former Transport Minister Douglas Lewis testified that the reason he did not transfer Pearson Airport to a local airport authority was that the Toronto LAA was not "a viable alternative." [*Committee Transcript*, Thursday, July 13, 1995, Issue No. 4, 4:9.]

This assessment is in marked contrast to that of the members of the Greater Toronto Regional Airport Authority who testified before the Committee. They described a process in which Mr. Lewis persisted in imposing significantly more stringent demands on them than were imposed on any of the other Canadian LAAs. Mr. Gardner Church testified:

"The federal government required support from the municipalities. Now in Vancouver and Montreal, they required support from a few municipalities. For reasons about which you can speculate, they required absolute unanimity twice from the Toronto community. And to get absolute unanimity from 35 municipalities on anything on any day is an heroic effort, and we undertook that effort twice successfully." [*Committee Transcript*, Tuesday, July 25, 1995, Issue No. 5, 5:16.]

When asked by Senator John Bryden to cast light on why the criteria applied to the GTRAA were more onerous than those applied to other formative LAA's, Gary Harrema, Chair of the Durham Regional Council replied:

"No, sir, I cannot. We did ask. And Mr. Lewis is very firm on the matter when he indicated that we had to have decisions from all our council.... Mr. Lewis indicated to us that privatization was the way that he wished to proceed and if we wanted to get involved in it at some stage, he did not say we would be totally excluded, but he certainly was not indicating to us that we should proceed, that he would take an LAA.... We met Mr. Corbeil later on again in '92 and it was similar -- somewhat different meeting, but similar reactions." [Committee Transcript, Tuesday, July 25, 1995, Issue No. 5, 5:18.]

In this time period, Paxport was lobbying Transport Canada to declare a three-year moratorium on the formation of new LAAs. When the Greater Toronto Area Airport Study Committee recommended that, "No action be taken with respect to further privatization of Terminals at Lester B. Pearson International Airport ... so that our task force may discuss privatization in context with the creation of a local airport body," the President of Paxport complained to Dr. Huguette Labelle, Deputy Minister of Transport, that this was "local obstruction," and that, "It is difficult to imagine the municipal and local interests of the GTA putting the national interest ahead of their own parochial needs." [See: Letter dated November 26, 1990 from Mr. Ray Hession to Dr. Huguette Labelle, Committee Doc. 001181; and see, Corporate Report from Mayor Hazel McCallion (Mayor of Mississauga) to the Chairman and Members of the Administration and Finance Committee, dated October 17, 1990, Committee Doc. 001181.]

The documents seen by the Committee support the GTRAA contention that the criteria being applied to their recognition were not the same as those applied to other LAAs. A letter of May 6, 1993 from the Hon. Jean Corbeil to Gerry Meinzer, then Interim Chair, Greater Toronto Regional Airport Authority, refused Mr. Meinzer's request for official recognition and authorization to begin negotiations for the transfer of Pearson Airport to the GTRAA. [Committee Doc. 000549] In the letter, Mr. Corbeil gives as his reason "that certain Councils have qualified their endorsements to some extent."

However, a handwritten notation on the file copy of this letter, apparently written and initialled by M.E. Farquhar, Director General, Airport Transfers at Transport Canada, says:

"Notwithstanding the above observations, the Toronto LAA already would appear to meet the government's prerequisites for becoming a LAA, consistent with the criteria applied to the first four LAA's." (emphasis added)

During the hearings much was made of the issue of the Toronto Island Airport, and the fact that one region, the Region of Peel, was insisting that the Toronto Island Airport be included within the transfer to the GTRAA. However, it is clear from the evidence that this is additional evidence showing that the Toronto LAA was held to a standard different from that applied elsewhere in Canada. For example, the Government proceeded to transfer one of two airports in Edmonton to a local airport authority, leaving the other airport in the hands of the City of Edmonton. Mr. Michael Farquhar, the person within Transport Canada responsible for negotiating the transfers of airports to LAAs, testified as to the decision to proceed with the transfer, even though the LAA wanted to negotiate the transfer of both airports:

"[F]rom the authority's point of view, it probably makes more sense to take over and demonstrate your ability to operate the major airport first and foremost, rather than trying to do it all at once.... [T]he minister was very familiar with the Edmonton situation." *[Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:50.]*

Mr. Gerry Meinzer testified that Mr. Farquhar had advised the regional chairs in 1992 that they had met all the conditions for recognition. *[Committee Transcript, Tuesday, July 25, 1995, Issue No. 5, 5:46.]* Mr. Farquhar himself was clear when he testified that by June, 1992 there existed in Toronto a body with whom Transport officials could discuss airport transfers. *[Committee Transcript, Tuesday, July 25, 1995, Issue No. 5, 5:79.]*

On June 18, 1993, Mr. Farquhar had prepared a briefing note for the Minister, recommending that, "Even if the Regional Municipality of Peel reconfirms its former resolutions on the proposed Toronto Island Airport transfer it would still be appropriate to endorse the GTRAA in light of our recent experience in Edmonton." *[Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:49.]*

And indeed, on July 12, 1993, the Ontario Government officially recognized the Greater Toronto Regional Airports Authority "for the purpose of entering into formal airport transfer negotiations with Transport Canada." *[Committee Doc. 00069]* The province's preference for an LAA at Pearson Airport was clearly stated in correspondence to the federal Transport Minister, including a letter dated July 30, 1991 from the Ontario Minister of Transportation to the Hon. Jean Corbeil *[Committee Doc. 000565].*

It is curious that while the Minister of Transport was insisting that the GTRAA demonstrate unqualified support for its formation from all the municipalities, no similar unqualified support was ever required for the private redevelopment alternative. In fact, the unequivocal and adamant opposition of municipalities to what the Government was proposing by way of the private sector solution carried absolutely no weight. **While a**

public sector LAA required unanimous public support, the private sector solution could be pushed ahead regardless of the level of outright public opposition.

The Deputy City Clerk for the City of Toronto sent the Right Hon. Kim Campbell, then Prime Minister of Canada, a letter on October 18, 1993, advising her of a motion adopted by Toronto City Council. That motion said:

"Whereas the Government of Canada has announced that Paxport has won the bid for the privatization of Terminals 1 and 2 at Lester B. Pearson International Airport; and

...

"Whereas the Government of Canada appears to have rushed to sign a deal which appears to be not in the best interest of the citizens of Toronto; and

"Therefore be it resolved that the Government of Canada be advised of the City of Toronto's opposition to the privatization of Terminals 1 and 2 of Lester B. Pearson International Airport in the current format, and that the City request that the Government of Canada re-open and reverse its decision, permitting further consideration." [Letter to the Rt. Hon. Kim Campbell, Prime Minister of Canada, from Deputy City Clerk, City of Toronto, dated October 18, 1993, Committee Doc. 002086.]

The evidence reveals that Toronto's case was pursued in a manner contrary to the policy established by the Government for the international airports in major centres throughout Canada. What was done at Toronto was justified to us by the urgent need to "fix" Pearson, and to do so quickly: speed was imperative. However, the private option to redevelop Terminals 1 and 2 was no speedier than the LAA option.

Even more important, however, is the fact that at the time the request for proposals ("RFP") was issued by the Government, there was no urgency to "fix" Pearson. As a result of the recession, Pearson was operating very much below capacity. The Mulroney Government could have adhered to its LAA policy at Pearson, just as it did at every other major airport in the country.

But the LAA option was rejected -- not only rejected, but, as the evidence suggests, deliberately frustrated -- in order to guarantee that there would be a private sector solution to the problem. Whether that problem still existed was irrelevant.

II. BACKGROUND: TERMINAL 3 PROCESS

In considering the process by which proposals to redevelop Terminals 1 and 2 were requested and then evaluated, the Committee had the benefit of the Terminal 3 experience for comparison. In contrast to the Terminal 1 and 2 redevelopment, the decision to invite the private sector to design, build, and operate Terminal 3 was made in September 1986 -- before the adoption of the 1987 policy framework for airports, which advocated the use of LAA's. [*Committee Transcript*, Tuesday, July 11, 1995, 1995, Issue No. 2, 2:44]

In September 1986, the Minister of Transport called for "expressions of interest" from the private sector, and asked for replies by November 19, 1986, three months after the call. [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:27.] Ed Warrick, retired Project General Manager, Major Crown Projects, Pearson Airports, testified that eight submissions were received in response. The RFP was issued on December 18, 1986, with a deadline of May 1, 1987, or approximately four months later. Thus, there were approximately seven months from the time of the call for expressions of interest to the time when the proposals had to be submitted. [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:27.] Four proposals were received; among the proponents were the Airport Development Corporation and Falcon Star. The Matthews Group was the main component of Falcon Star. [*Ibid.*]

While not a member of the original Airport Development Corporation, the Claridge Group came in as a minority stakeholder after the contract was signed. [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:30-31.] Peter Coughlin, President of Claridge Properties Ltd., was very clear as to why Claridge purchased a controlling interest in Terminal 3: "Our rationale for purchasing an interest in Terminal 3 was driven, to a large extent, by the government's announced intention to privatize Terminals 1 and 2. We did not want to operate just one piece of the pie. To us, operation of all three terminals was necessary in order to: Diversify our risk across the terminals; to produce significant operating and financial synergies; and to enhance our economic return." [*Committee Transcript*, Tuesday, September 12, 1995, Issue No. 17, 17:12.]

The proposals were evaluated during May, 1987. Mr. Warrick testified that **financeability was one of the factors addressed in the evaluation.** [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:28.] The financial viability of each proposal's proponent carried roughly 40 per cent of the total weighting in the evaluation. [*Committee Transcript*, Tuesday, July 11, 1995, Issue No. 2, 2:74.]

Mr. Warrick told the Committee that the evaluation was conducted by senior Transport Canada officials, supported by other groups within government, who could assist

with opinions on security, customs and immigration, and pre-clearance matters. [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:28.]

On June 22, 1987, the Government announced the "preferred proponent," the Airport Development Corporation. Mr. Warrick testified that he was aware of adverse reactions to this selection by the unsuccessful proponents. In particular, the Matthews Group "were unhappy and voiced their displeasure" with the selection. [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:28-29.]

Treasury Board approved the final lease in April, 1988, nineteen months after the call for expressions of interest. Terminal 3 opened on February 21, 1991. [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:29.]

The Committee was told that the procedure used for Terminal 3 has become, in general, a model of how to conduct such public proposal calls. Al Clayton, Executive Director, Bureau of Real Property and Material at Treasury Board, testified that his office used "Terminal 3 as a model, as a good practice of how you do such -- not necessarily how you do airports, but how you do these types of public proposal calls." [*Committee Transcript*, Wednesday, July 12, 1995, Issue No. 3, 3:37.]

III. THE PROCESS: TERMINALS 1 AND 2

Events Leading up to the RFP

On August 18, 1989, the Hon. Benoit Bouchard, Minister of Transport, and Ms. Shirley Martin, Minister of State for Transport, announced their Strategy for the Future of Aviation in Southern Ontario. It included an initiative to develop Pearson Airport "to its optimum capacity." [Minister's Press Release No. 98/89, August 18, 1989.] The short-term (within two years) measures to implement this strategy included "top priority for renovation plans to Terminals One and Two at Pearson International Airport which, along with new Terminal Three to be completed by mid-1990, will give the travelling public three efficient, comfortable terminal buildings." Other short-term measures included two new runways for Pearson, recruitment of air traffic controllers, and development of Hamilton Airport to accommodate flights transferred from Pearson.

As will be seen, the negotiated agreement with T1T2 Limited Partnership (the consortium that resulted from the Paxport-Claridge merger) would have made further development of Hamilton Airport -- as an alternative to Pearson -- impossible: the developers succeeded in persuading the Government to agree to a passenger diversion guarantee, by which the Government specifically undertook not to divert passengers away from Pearson until certain passenger levels at Pearson had been met.

Documentation provided to the Committee shows that even before this press release had been released, the Matthews Group, which had bid unsuccessfully on the Terminal 3 project, was positioning itself to redevelop Terminals 1 and 2 at Pearson Airport. As early as May, 1989, Mr. Ray Hession (who became President of Paxport Inc.) was meeting with Deputy Ministers and Assistant Deputy Ministers in both the Department of Finance and Transport Canada, making the case for private redevelopment of Terminals 1 and 2, and for the selection of Paxport as the "preferred developer." [See, e.g., letter from Mr. Hession to Mr. Glen Shortliffe, Deputy Minister of Transport, dated August 15, 1989, Committee Doc. Ref. 5700-1.35/P1-13, 1-1-#0157.]

It is interesting to note the criteria advocated by Paxport for evaluating developers: the magnitude of the return to the Crown is a central concern, while the financeability of the proposal, including the developer's strength, is strangely absent. Further, while "qualitative" improvement in specified service to the travelling public is emphasized, there is no mention of any criteria concerning the commensurate rise in cost to that travelling public. The evaluation criteria adopted by the Government to assess the proposals to redevelop Terminals 1 and 2 closely reflected those advocated by Paxport -- in sharp contrast to those used in the Terminal 3 proposal evaluation. [Committee Doc. Ref. 5700-1.35/P1-13, 1-1-#0157.]

In September 1989, Paxport submitted an unsolicited proposal to redevelop Terminals 1 and 2. Unsolicited proposals were later received from Canadian Airports Ltd. (which included the British Airports Authority -- a group with extensive experience in airport development and operation) and Airport Development Corporation (the developer of Terminal 3, which by this time included Claridge as a minority shareholder). On June 1, 1990, Paxport and Air Canada joined together to submit a proposal, described by Senator Jessiman as "a Paxport plan to integrate Terminals 1 and 2." [Committee Transcript, Tuesday, August 15, Issue No. 11, 11:48.]

Throughout this period, Paxport was making its case to Members of Parliament, Cabinet Ministers, Ministers' political staff, and public servants. To do this, Mr. Hession engaged a team of lobbyists led by William Neville and including John Legate and Hugh Riopelle. They met "with officials of the Departments of Transport, Finance, Justice, Industry and International Trade, the Treasury Board, and the Privy Council Office ... political staff at the departments of Transport, Industry and Finance, the Treasury Board, the Deputy Prime Minister's Office and the Prime Minister's Office ... [and] the ministers of the Crown, including the ministers of Transport, Finance and Industry, the Treasury Board[.]" [Minutes of Proceedings and Evidence of the Standing Committee on Transport, May 26, 1994, 7:8.]

The truth of this testimony is borne out by a review of Mr. Hession's daily agenda books, copies of which he provided to the Committee. The pages document numerous meetings, lunches, dinners, and golf games with Cabinet Ministers, including not only the Hon. Jean Corbeil, when he was Minister of Transport, but also the Hon. Harvie André and the Hon. Otto Jelinek; with senior members of political staffs to Cabinet Ministers, including the Hon. Doug Lewis, the Hon. Jean Corbeil, and the Hon. Don Mazankowski (both from when he was Minister of Transport and Finance Minister); and the Chiefs of Staff to the Prime Minister, including a meeting on July 22, 1991 with Mr. Norman Spector, Chief of Staff to Mr. Brian Mulroney, and a meeting on July 20, 1993 with Ms. Jodi White, Chief of Staff to Ms. Kim Campbell.

Mr. Hession also met with other individuals reputed to be close to Prime Minister Mulroney, including the Hon. Guy Charbonneau (appointed Speaker of the Senate by Mr. Mulroney in 1984), and with two close friends of Mr. Mulroney dating back to his undergraduate days, Mr. Sam Wakem and Dr. Fred Doucet. (Dr. Doucet later became a registered lobbyist for Paxport.) In addition, there are many meetings with public servants, including not only those in Transport Canada with immediate responsibility for Pearson Airport, but also individuals in the Privy Council Office, most notably Mr. Glen Shortliffe, the Clerk of the Privy Council.

This campaign continued throughout the relevant time period, from 1989 through 1993. As will be discussed below, it yielded valuable results for Paxport.

We do not object to valid attempts by Paxport or other groups to seek to influence the Government in its policy-making; our objection is to their success, that is, to the fact that members of the Government were prepared to change public policy and make new rules in response to these representations, often against the considered judgment of their public servants, against good business judgment, and against the best interests of the country.

The access available to Paxport and its lobbyists is revealed in a memorandum provided to the Committee by Mr. Hession.²² In that memorandum (dated July 12, 1990, to Mr. Don Matthews, Mr. Jack Matthews, Mr. Peter Goring and Mr. Trevor Carnahoff), Mr. Hession reported on two recent meetings of interest to Paxport. [See: Memorandum to "Mailing List," from Mr. Hession, dated July 12, 1990, Committee Doc. Ref.: 5700-1.35/P1-13, 1-3-#0272.]

The first was a meeting he had the day before with Mr. Shortliffe. Among other issues discussed were: (1) the evaluation criteria that would be applied in selecting a developer; (2) the need for an approved policy to "ensure that no foreign company will directly or indirectly manage and control the terminals" (this presumably was aimed at the anticipated competition from Canadian Airports Ltd., that included British Airports Authority as a significant part of the group); and (3) whether an approved policy was in place "that no private company will dominate the management and control of terminal facilities" (this presumably was aimed at anticipated competition from Airport Development Corporation, the developer at Terminal 3).

The second meeting described in the memorandum was between Mr. William Neville, one of the registered lobbyists acting for Paxport, and Mr. Everson, the Chief of Staff to Transport Minister Doug Lewis. Mr. Neville's report, quoted in Mr. Hession's memorandum, states that he had "a **full debriefing** yesterday (July 10) from Warren Everson re **the situation post-last week's P[riorities] and P[lanning] meeting.**" (emphasis added.)

Mr. Neville reported that the Hon. Doug Lewis, Minister of Transport, had "promised the Prime Minister he will be before Cabinet in September with specific recommendations on... an "efficient" competition process to select a developer for full-scale redevelopment of

²² Mr. Hession provided a number of documents to the Committee, ending essentially in December 1992, although he acknowledged when he testified that they were by no means all the relevant documents available. When asked about documents for the period December 1992 through March 1993, Mr. Hession replied, "Senator, there are documents that would fill half this room between that period." [*Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:36.] Unfortunately, although the Committee requested that those documents be produced, none was provided by Paxport or the Matthews Group.

1 and 2." Mr. Everson described his Minister as "quite nervous" about "any attempt to jump over some form of competition to a unilateral decision."

There were, according to Mr. Everson, problems in such an approach, including:

- The existence of internal analysis by MOT [Ministry of Transportation] officials advising the Minister that, in their judgement, major expansion of T1 and 2 is not required before 1997;
- A Coopers, Lybrand valuation that the current terminals are worth \$1.6 billion and that valuation should be reflected in any privatization; and
- "Heavy pressure" from the other potential bidders, including increasing threats by BAA [British Airport Authority] partners Bitove and Cogan that they might well launch legal action if they are denied a fair opportunity to compete.²³

Mr. Neville reported:

"Back on the central issue, it is clear at this point that **Lewis of his own accord is not prepared to move unilaterally to award development to PAXPORT/Air Canada. He will have to be pushed/ordered** -- which, I guess, begs the question whether that is smart strategy even if it is doable. I have my doubts." [Memorandum to "Mailing List," from Mr. Hession, dated July 12, 1990, Committee Doc. Ref.: 5700-1.35/P1-13, 1-3-#0272, emphasis added.]

When he testified about this memorandum, Mr. Hession was clear that in his understanding, only one person is in a position to "push/order" a Cabinet Minister to do anything:

²³ As will be seen, arguably British Airports Authority was "denied a fair opportunity to compete," as the Request for Proposals was drafted to exclude foreign-controlled proponents. The Committee does not know why Mr. Bitove and Mr. Cogan decided not to pursue their threats of legal action. Mr. Jack Matthews clarified that Mr. Bitove was Mr. John Bitove Senior, who "operated and operates now...the food concessions at maybe all three terminals." Mr. Cogan was Edward Cogan, a real estate broker and developer. [Testimony of Mr. Jack Matthews, *Committee Transcript*, Thursday, September 21, 1995, Issue No. 22, 22:115-116.] It has recently come to light that Prime Minister Brian Mulroney intervened with active -- and, as the Court found, "extraordinary" -- steps to assist Mr. Bitove with the food concession contract at Pearson Airport, in 1989. [*Canada (Attorney-General) v. Bitove*, [1995] O.J. No. 2627, Court File No. B31/94A, decision of Lederman, J.] And Mr. Cogan was one of two directors of Sagegate Corporation, a company that would have benefited from \$2 million contracts awarded Dr. Fred Doucet (a former senior member of the staff, and long time friend, of Mr. Mulroney), which contracts were contingent on Paxport obtaining the Pearson deal. [See: Testimony of Mr. Jack Matthews, *supra*, 22:122.]

Senator Bryden: [Y]ou have been a long-term civil servant, you are perhaps one of the most knowledgeable people "on the Hill." In our system, cabinet system, who is in a position to either push or order a cabinet minister?

Mr. Hession: There's only one person who could do that.

Senator Bryden: Who's that?

Mr. Hession: That's the Prime Minister.

Senator Bryden: That would be Brian Mulroney, at this time?

Mr. Hession: Yes. [*Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:87.]

Mr. Hession concluded this memorandum, noting that concerns about

"foreign interests achieving control of terminal management at Pearson; [and] the undesirability of monopolistic dominance of terminal operations by ADC ... **could sway the cabinet to proceed with direct negotiation or accept a competitive process highly favourable to our cause.**

"We must, therefore, maintain the intensity of our efforts and, I believe, broaden their scope to include full cabinet and caucus." [*Memorandum to "Mailing List,"* from Mr. Hession, dated July 12, 1990, Committee Doc. Ref.: 5700-1.35/P1-13, 1-3-#0272.]

Mr. Hession's memorandum discloses the role of lobbyists in this project, the role of ministers' political staff in assisting Paxport, the dynamics within Cabinet, the apparently preferred position of Paxport, as well as the substantive issues in the redevelopment project itself. The memorandum shows that Transport Minister Lewis' Chief of Staff had information that there was no urgency about the redevelopment project, and that major expansion of the terminals was not required for another seven years. In a letter to the Editor of the *Globe & Mail* dated September 22, 1995, Mr. Everson confirmed having had this meeting with Mr. Neville, and stated, "Naturally Mr. Lewis was aware of these meetings and authorized them."

On October 17, 1990, Transport Minister Doug Lewis announced his intention to invite competitive proposals to develop Terminals 1 and 2. [Press Release No. 198/90, dated October 17, 1990.] At that time, an environmental assessment and review panel was considering a proposal by Transport Canada to add new runways at Pearson. Minister Lewis made it clear in meetings with Paxport, Airport Development Corporation, and Canadian

Airports Ltd. that the terminal proposal would not be rushed at the expense of the environmental review.

The RFP was not issued until March 16, 1992, that is, seventeen months after this announcement. When asked about this delay, Mr. Barbeau told the Committee that:

"There were a lot of things going on.... [T]here was a whole lot of discussion going on, as I pointed out before, I mean, all over the place, and other things were happening.

"Certainly what was happening in the later part of that period is that the traffic at Pearson had begun to slow down. There were signs of the economy really taking a dive and the traffic was slowing down." *[Committee Transcript, Wednesday, July 12, 1995, Issue No. 3, 3:93.]*

Throughout those seventeen months, Paxport was urging the Government to adopt the developer selection process best suited to Paxport's success -- in particular, Paxport advocated a "contract definition" approach. As explained by Mr. Hession in a letter to Huguette Labelle, then Deputy Minister of Transport:

"Contract definition - This option involves a three-stage process wherein the developer is chosen by the government on the basis of non-financial (price) considerations in the 60-90 day first (contractor qualification) stage. The process then results in a negotiated agreement based on a development contract proposed by the developer at the end of the 90-120 day second (contract definition) stage. The third (implementation) stage would commence at a time negotiated in the development agreement. This option has the political advantage of objective selection in stage one and the achievement of a negotiated balance as between the government, air carrier and private developer interests in stage two." [See: Letter from Mr. Hession to Dr. Labelle dated December 7, 1990, and attachment.]

Mr. Hession pointed out that this approach was one of three. Another option was a competitive proposal call; he rejected this as taking too much time. He also noted that, "The option has the political advantage of appearing completely objective although, typically, there is little or no practical political discretion in the decision-making." The final option was a negotiated agreement between the Government, air carriers and the private developer. While this option was the fastest, Mr. Hession recommended against it; he noted it "has the disadvantage of appearing to be subjective and politicized."

In addition to avoiding competition, it is notable that Paxport's preferred approach minimized any need for the developer to demonstrate financeability; when officials pressed Mr. Hession with their concerns regarding financial selection criteria, he replied by saying:

"The contract definition approach envisages a selection process based on both non-financial and financial criteria. Of course, the government must secure an advantageous financial arrangement and therefore include financial criteria as part of the basis for competitive selection." [See: Letter from Mr. Hession to Dr. Labelle, dated January 18, 1991.]

Thus, from inception, Paxport lobbied to assure that any financial criteria requirement would relate to the "return to the Crown" issue, not to the ability of the developer to finance the proposal.

Paxport also lobbied strenuously in this period against any need to have an "Expression of Interest" or prequalification stage in the proposal process. As discussed above, the Terminal 3 project, which officials testified was viewed as a "model" of how such proposals should be handled, had entailed a two-stage process, that is, an expression-of-interest ("EOI") or prequalification phase, before the request for proposals.

Paxport's efforts to this end were particularly evident in a series of meetings held by Transport Canada officials during the week of April 15, 1991, with each of the three developers known to be interested: Paxport, Airport Development Corporation, and Canadian Airports Ltd. [See: Committee Doc. 001114] The memorandum of the meeting with Paxport notes that:

"Paxport does not see need or usefulness of an EOI stage. The Government's criteria for a competitive process is satisfied by three proposals. There is clear evidence that there are three interested competitors so there is no need to open the process any further. There is a substantiative cost associated with preparing submissions for a two-stage process." [Doc. 001114]

This approach contrasted sharply with the positions of the other developers. Airport Development Corporation opposed any redevelopment of Terminals 1 and 2 at that time, arguing:

"TC's #1 priority should be runway capacity expansion.

ADC's basic position is that:

- the T1/T2 redevelopment should be deferred;
- the airline industry cannot afford a major new capital investment at this time;
- there is a surplus of capacity in T2 and T3;
- T1 should be mothballed and T1 carriers reassigned to T2 and T3." [Doc. 001114]

Canadian Airports Ltd. argued in favour of a two-stage process:

"CAL agrees with the two-stage proposal call approach, i.e. EOI & RFP.

Factors to be addressed at EOI stage:

- experience in terminal redevelopment work (only BAA and TC has that experience);
- track record in major projects/airport operations;
- experience in terminal operations, particularly with respect to safety and security matters during reconstruction." [Doc. 001114]

It is clear from the documents that Transport Canada recommended the use of a two-stage process, with an Expression of Interest stage before the Request for Proposals. [See, e.g.: "What are the various ways that a developer can be retained?", dated January 8, 1991, Committee Doc. 001063.]

Wayne Power, Director of Transition at Pearson Airport, confirmed to the Committee that "for the T1T2 project, there was a draft expression of interest prepared." [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:13; and see the draft "Call for Expressions of Interest," dated June 5, 1991, Committee Doc. 001060.] Such an expression of interest would have required "a detailed statement of the [proponent's] qualifications to undertake the project," which Mr. Power stated normally would include the experience of the developers on similar projects, including whether they had completed projects of that size or complexity before. [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:13.]

Mr. Power and Mr. Gerry Berigan, now Regional Director for Airports, Atlantic Region, and formerly a senior executive in charge of the Terminal 1 and 2 redevelopment project in Ottawa, both testified that the decision to use a one-stage procedure, and to forego the expression-of-interest stage, was made by the Minister. [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:9 and 6:13; and see Memorandum from L.A. McCoomb to V.W. Barbeau, dated August 21, 1991, Committee Doc. 001047, confirming Minister's "recent direction" that "there will be a single stage proposal call process, i.e. no Expression of Interest or Qualification stage."]

It is interesting to consider how Paxport would have scored under criteria such as those proposed by Canadian Airports Ltd. As the memorandum shows, Paxport had no experience in terminal redevelopment work; by their own statements, they had no track record in airport operations; and no experience in terminal operations, other than having submitted an unsuccessful proposal for Terminal 3. [See: Opening Statement of Gordon Baker, Committee Transcript, Wednesday, September 13, 1995, Issue No. 18, 18:5-9.]

At the very time when it was arguing that an expression-of-interest stage was unnecessary because three interested developers had been identified, Paxport was lobbying for the disqualification of the other two developers. Mr. Hession wrote Mr. Lewis repeatedly to "point out the serious pitfalls associated with the inclusion of foreign competitors in the

development of Terminals 1 and 2 at Pearson International Airport." [See: Letter from Mr. Hession to Minister Lewis dated June 19, 1990.] While directed primarily at British Airports Authority, the main party in the Canadian Airports Ltd., Mr. Hession also extended this argument to Paxport's other main competitor, Airports Development Corporation, 27% of which was then owned by Lockheed. Mr. Hession was not subtle: "Today's foreign partner becomes tomorrow's competitor." [See: Letter from Mr. Hession to Mr. Lewis, dated June 29, 1990, Committee Doc. Ref: 5700-1.35/P1-13, 1-1-#0271, emphasis in original document.]

Paxport advocated also that the Government "promote competition between terminal operators at Pearson for the benefit of improved service at competitive prices." [See: "Questions for Consideration," dated October 15, 1990, for meeting with Transport Minister Doug Lewis, Committee Doc. Ref.: 5700-1.35/P1-13, 1-2-#0280.] In other words, Airports Development Corporation should not be considered for the contracts for Terminals 1 and 2.

Paxport was partly successful in these representations. The RFP stipulated that to qualify, a developer had to be "Canadian as determined in accordance with the *Investment Canada Act* (R.S., 1985, c. 28 (1st Supp.)) and be controlled in fact by Canadians." This may effectively have kept Canadian Airports Ltd. from submitting a proposal, but clearly did not exclude Airport Development Corporation with its U.S. minority shareholder.²⁴ Ultimately, Paxport merged with the Terminal 3 group to form Mergeco (and then T1T2 Limited Partnership)²⁵, so that it was fortunate, for Paxport, that its stand against monopoly control did not prevail.

²⁴ The Hon. Jean Corbeil, Minister of Transport, apparently was unaware of this restriction in the RFP. When he appeared before the Committee he expressed surprise that Canadian Airports did not submit a bid: "I was convinced that there were at least three bidders because Canadian Airports was in the process the whole way. They had communicated with us on a number of occasions pressing us to request the proposal. On December 23, 1991, when I received a letter stating that they were leaving Canada because the process had taken too long and no request for proposals had yet been issued, I was virtually convinced that they would reverse their decision when we issued the RFP three months later. That did not materialize and we had two bidders. I would recall that there were four bidders on T3." *Committee Transcript*, Wednesday, September 20, 1995, Issue No. 21, 21:42-43. In fact, however, Canadian Airports may not have been able to submit a bid, because they may not have qualified under the restrictive terms of the RFP. Whether or not they would have expended the money and effort needed to put in a proposal is also unclear. During the course of Mr. Robert Nixon's review of this deal, Mr. Stephen Goudge, the lawyer who assisted Mr. Nixon, included a note to himself recording his impression after meeting interested parties: "Note: BAA thought fix was in, so did LAA." [Testimony of Stephen Goudge, *Committee Transcript*, Wednesday, September 27, 1995, Issue No. 26, 26:34.]

²⁵ The parade of different company or partnership names can be daunting. The partnership of the Claridge Group and the Matthews Group was originally named Mergeco, and was thus referred to in many documents and much of the testimony before the Committee. Eventually this name was changed to Pearson Development Corporation, or PDC. Pearson Development Corporation was to be the managing general partner for T1T2 Limited Partnership, which was the contractor with the Government for the redevelopment project.

Mr. Hession also repeatedly expressed his dismay over the delay to the process caused by the need to wait for the results of the environmental assessment review panel on the runway proposal. Mr. Lewis, as Minister of Transport, and Transport Canada officials had made a number of public statements to the effect that it was their intention to release the RFP only after the federal Environmental Assessment Review Panel issued its recommendations. [*Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:15-16.] These statements were summed up in a May 16, 1991 memorandum written by Mr. Chern Heed, general manager of Pearson Airport:

"Clear commitments have been made to the public that no steps to expand the capacity of Pearson airport will be taken until after the results of the environmental assessment review is known." [Committee Doc. 001161, quoted at: *Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:16, emphasis added.]

Nevertheless, as Mr. Berigan testified, for reasons not known to him, the RFP was issued on March 16, 1992, five months before the EARP report was released on November 30, 1992. [*Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:16.]

The Committee saw a memorandum listing the "risks associated with issuing RFP prior to runway decision." That memorandum lists as an assumption, "EOI [Expression of Interest] has prequalified developers." It then goes on to list as the risks: "public perception of EARP/credibility; reaction of Panel itself; return to Crown likely diminished." [Document entitled, "Risks Associated with Issuing RFP Prior to Runway Decision," Committee Doc. 001071.] **Nevertheless, the Minister directed not only that the Department proceed with the RFP without waiting for the results of the environmental assessment on the runways, but also that they forego any expression of interest, or prequalification stage.** [See: Memorandum to Mr. V.W. Barbeau from L.A. McCoomb, dated August 21, 1991, Committee Doc. 001047, confirming "the Minister's recent direction with respect to the redevelopment of Terminals 1 and 2."]

The findings of the environmental assessment report were, however, very relevant to this project:

"(a) There is now no likelihood that passenger aircraft movement demand will reach the levels projected in the environmental impact statement for 1996 before the year 2001 and maybe even later;

"(b) There is no serious and continuing problem of traffic congestion at Pearson at the present. The problems with congestion virtually disappeared due to an improvement in the use of runways and a decline in demand caused by the recession;

"(c) A decision on runway expansion can be deferred for two to three years without significant risk." [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:17.]

These findings were immediately reported to the Prime Minister by Mr. Glen Shortliffe. [See: Memorandum for the Prime Minister dated December 4, 1992, Committee Doc. 002085.]

Thus we see that by 1992 the "crisis" at Pearson had ended. No longer was there a need for immediate action. Moreover, the Air Transport Association of Canada, an industry association of airlines and other commercial aviation interests in Canada, testified before the Committee that they made repeated representations to the Government that the Terminal 1 and 2 redevelopment project was not needed, and not wanted by the industry; it was neither timely nor appropriate. The first such representation was made by letter to Transport Minister Corbeil, dated September 6, 1991 -- fully six months before the RFP was issued. [Committee Doc. 00036]

When he testified, Mr. Gordon Sinclair, formerly President of the Air Transport Association of Canada, elaborated on his organization's position at that time:

"You will recall that we were in the midst of a very significant recession at that point [in] time. You will also recall that there was a substantial upheaval in the aviation industry with respect to the difficulties between Air Canada and Canadian. 1991 passenger volumes at Pearson were headed for a 15 per cent decline from the previous high in 1989 and '90. The recovery from the recession was uncertain. There [was] just too much uncertainty in the circumstances to warrant any other conclusion at that point [in] time." [Committee Transcript, Thursday, August 17, 1995, Issue No. 13, 13:77.]

Two months later, on November 12, 1991, the membership of the Air Transport Association of Canada unanimously passed a resolution that said:

"BE IT HEREBY RESOLVED THAT ATAC make strong and immediate representations to the Minister of Transport and the Government of Canada to delay any consideration of redeveloping Terminal I at Toronto until the rate of recovery of passenger traffic is established and to postpone any redevelopment of Terminal II until the carriers using that Terminal identify such a requirement." [Committee Doc. 00038.]

This resolution was sent to Transport Minister Corbeil on November 29, 1991. Mr. Sinclair testified that he thought he received a reply the following May -- six months later, and two months after the RFP issued. [Committee Transcript, Thursday, August 17, 1995, Issue No. 13, 13:78.]

In the meantime, on March 5, 1992, prompted by information that the RFP was about to issue, Mr. Sinclair had sent another letter to Mr. Corbeil. That letter began:

"It has come to our attention that you will be issuing Requests for Proposals (RFP) to redevelop and operate Terminals 1 and 2 in Toronto.

"This initiative is not supported by the airline industry in Canada because it is not needed at this time. Passenger terminals are not a separate business. They are not shopping centres. They are an integral part of the service link that the consumer uses in purchasing transportation from an air carrier or a travel agent. To set up a private operator in such a monopolistic position is to inflict a major injustice on the travelling public.

"Several years ago the government followed a course of action with Terminal 3 which involved a financial package which attempted to secure the best possible financial deal for Transport Canada. The prospective bidders knew they could bid with consumers' money because, if successful, they would be in a monopoly position." [Committee Doc. 00301]

The meaning of this statement was underscored when Mr. Sinclair was before the Committee:

Mr. Sinclair: At the time that Terminal 3 was put out for bids, there was a two stage process, one which qualified certain bidders to proceed to the second stage, and there was no problem with that. The second stage was in effect the financial stage. In fact, the project was evaluated primarily on the financial return that it gave to Transport Canada and the Government of Canada.

In other words, a developer could bid a fairly large amount of money knowing then that he would be in a monopoly position with respect to the carriers that had to use that terminal in order to get whatever money he had committed as costs to Transport Canada. He would be able to get these costs back from the air carriers and the travelling public.

Senator Kirby: Which is essentially what Paxport did in its response to the RFP?

Mr. Sinclair: Exactly. That's why we disagreed again with that kind of approach which puts a private developer in a no-lose situation. **He in effect is bidding with someone else's money.** [Committee Transcript, Thursday, August 17, 1995, Issue No. 13, 13:79, emphasis added.]

Air Canada also opposed the issuance of the RFP. Mr. Dominic Fiore, retired Senior Director, Corporate Real Estate, Air Canada, told the Committee:

"Of course, 1990 was the year the recession hit the airline business in Canada and around the world like a tidal wave. Air Canada began a very difficult process of cutting costs and downsizing. We dropped marginal routes, sold aircraft, deferred all capital expenditures and began laying off thousands of employees. Phase 2 of the terminal refurbishment was also downscaled from \$250 million to \$160 million and postponed until an improvement was apparent in Air Canada's finances.

"While Air Canada was in the early stages of downsizing, the federal government announced its intention to issue a request for proposal to redevelop Terminals 1 and 2. They also requested Air Canada's input on further improvements to Terminal 2 in order to provide specifications to interested bidders.

"While we provided our phase 2 plans, we, nevertheless, asked that the government postpone the request for proposals in light of our difficult financial situation and our inability to absorb high terminal operating costs." [Committee Transcript, Wednesday, August 16, 1995, Issue No. 12, 12:76.]

Even Claridge Properties Ltd., which ended up as the controlling partner in T1T2 Limited Partnership, wrote on November 13, 1991 to the Hon. Gilles Loiselle, President of the Treasury Board and Minister of State (Finance), opposing the issuance of a RFP for the redevelopment of Terminals 1 and 2. [Letter from Mr. Peter Coughlin, President, Claridge Properties Ltd., to the Hon. Gilles Loiselle, dated November 13, 1991, Committee Doc. 001137.] The letter noted that in opposing the issuance of a RFP, Claridge was joined by Canadian Airlines International, Air Canada, and the Air Transport Association of Canada.

Mr. Coughlin concluded his letter with a review of the sharply reduced traffic levels at Pearson Airport: "Traffic at Pearson is currently running at 1987 levels. With the opening of the T3 satellite terminal in December 1991 and the major renovations recently completed at T2, there is adequate terminal capacity at Pearson, WITH T1 MOTHBALLED, for another 6 to 7 years." (Emphasis in original document.) He then offered:

"In addition and should everyone's predictions be horribly inaccurate, the owners of T3, **at their own cost**, would make the necessary arrangements to develop the other half of Pier B which is currently not in use. This would be done **in a matter of months, at no cost to the Government and would provide ample capacity beyond the year 2000.**" [Letter from Mr. Peter Coughlin, President, Claridge Properties Ltd., to the Hon. Gilles Loiselle, dated November 13, 1991, Committee Doc. 001137, page 4, emphasis added.]

The Conservative Member of Parliament for Mississauga South, Mr. Don Blenkarn, wrote to Transport Minister Corbeil on March 13, 1992, protesting the proposed redevelopment project at Pearson Airport. He contended first that, "on the current volume and, indeed, on projected volumes nearly to the year 2000 there is no conceivable need for

further airport terminal expansion. Indeed, unless there are new runways there is no need whatsoever for substantial terminal improvement or expansion other than regular maintenance and regular upkeep."

His letter continues:

"What comes through to all sorts of people critical of our government is some sort of a quick pay off to friends who want to develop airports and it doesn't taste well and it doesn't sound well and it leaves all sorts of suspicions and it doesn't add up or balance.

"As Terence Corcoran [of the *Globe & Mail*] ... says, "Privatization is desirable, but the framework outlined so far is much too sketchy." So sketchy in fact as to be seriously damaging to our credibility. So sketchy in fact as to be indefensible. In my view, nothing destroys political credibility more than to do something that does not have a balance in the mind of the public. The problem here is important to me and to our other members in Mississauga. Within a year or so we are going to be asked to run for re-election in Mississauga, and when things are done in our city that stretch our credibility and the credibility of the government, it just makes things very much more difficult for us.

"Dr. Horner, Mr. Chadwick and I know the close relationships that of [sic] number of the proponents of airport reorganization and their relationship with our Party and how supportive they have been in the past. In our view, the name of the game is to get elected. Overwhelming interest is to make sure that our constituents, and the country generally, are well governed and the whole proposal at this point does not balance and our detractors clearly know that." [Committee Doc. 000996]

On the other side of the House, Mr. Jean Chrétien, then Leader of the Opposition, adamantly opposed the decision to issue the RFP, and denounced the atmosphere of patronage already in evidence. He asked the Minister of Transport a question during Question Period on March 12, 1992; the Minister was careful to avoid the patronage issue in his response:

Hon. Jean Chrétien (Leader of the Opposition): The government has announced that it is rushing ahead with plans to privatize terminals 1 and 2 at Pearson airport, an airport that makes a \$100 million profit every year. The airline, the province, the regional governments say: "We do not need it".

I want to know from the Minister [of Transport] why he is going ahead with this when everyone says that it is not needed. Why does he want to give \$100 million of profit to the private sector at the expense of the government?

...

The minister has now said that developers will have 90 days to come up with proposals for taking over these terminals. Canadians should know that one company, Paxport, has a major head start. It even had a scale model of a proposed new terminal airport on display at the Rideau Club for members of Parliament two years ago. A principal in that company is Don Matthews, a former chairman of the PC Party and fund raiser for the Prime Minister in his leadership bid.

We all know that the Prime Minister likes to roll the dice. Can the minister assure us that in this case he is not loading the dice for his friends?

Hon. Jean Corbeil (Minister of Transport): Mr. Speaker, we should perhaps recall that when submissions to build terminal 3 were requested, the person that the Leader of the Opposition just referred to was one of the bidders, but he did not get the contract. Instead, the contract was awarded to friends of the Liberal Party. [*House of Commons Debates*, March 12, 1992, p. 8121-22.]

The next day, the issue was raised again in Question Period, this time by Mr. John Manley:

Mr. John Manley (Ottawa South): ... Why does the minister not remove the foul odour of political favouritism and opportunism from the timing of the announcement of this project and do what Mr. Sinclair from the airline association suggested and simply wait until 1993 when we see how the airline industry shakes down?

...

Madam Speaker, what is not clear is who is making the decisions for Transport Canada on this issue. [*House of Commons Debates*, March 13, 1992, p. 8183.]

And as he did the day before, Mr. Corbeil declined to deal with the question, except to say, "We have taken notice of [Mr. Sinclair's] objection." With respect to the questions about patronage, again the minister declined to answer. [*House of Commons Debates*, March 13, 1992, p. 8183.]

Issuance of the RFP

Despite these many representations and pleas, the Government issued the Request for Proposals on March 16, 1992. The RFP stipulated a 90-day period to respond. Documentation produced for the Committee reveals concern within Transport Canada that this period was too short. In a memorandum dated October 29, 1991, Mr. Chern Heed, general manager of Pearson Airport, wrote to Mr. Barbeau:

"We still are concerned about the perception created by the very short time period for RFP responses (90 days) vis-à-vis the integrity of the process. This concern has

been reinforced by the observations of Price Waterhouse, the consulting firm engaged to assist in preparation of the Request for Proposals. Price Waterhouse (without prompting) has commented that, notwithstanding that the Department may consider requests to extend the response time, **publication in the RFP of a 90 day response time for proposals could convey the message that the Department is not committed to a fully open and competitive process.**

"The number and complexity of the issues to which proponents must respond with mature and firm proposals **require a response period of not less than six (6) months.** Also, if any groups other than the three who have already prepared preliminary proposals become involved, a request for an extension beyond six months would not be unexpected. We hope that there will be an opportunity to reconsider the matter of the published RFP response time." [Committee Doc. 000639, emphasis added.]

Mr. Wayne Power also testified that **the 90-day response period would have acted as a constraint on new groups seeking to submit proposals.** [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:38.] Mr. Power told the Committee that the issue of the reasonableness of the 90-day period was the subject of discussion at several meetings in that period. He noted that this proposal was a more complex proposal than that for Terminal 3, although the response time allowed for the Terminal 3 RFP was four and a half months. [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:17-18.] (In fact, as we have seen, Terminal 3 used a two-stage process, and the total time between the calls for expressions of interest and the due date for proposals on the RFP was seven months. [Committee Transcript, Wednesday, July 12, 1995, Issue No. 3, 3:27.])

In fact, Paxport had lobbied strenuously for a short response period. For example, when Mr. Hession wrote to Mr. Lewis on October 22, 1990 to discuss the forthcoming Request for Proposal, he enclosed a list of questions "intended more to focus attention on concerns peculiar to the situation." The first question was:

"In light of the unsolicited proposal activity and the notice given by the Minister's announcement on October 18, 1990, is it the department's intention to foreshorten the time for the bidders' proposal preparation and response to, say, 6-8 weeks in order to hasten the evaluation and decision process?" [See: Attachment to letter from Mr. Hession to Mr. Lewis, dated October 22, 1990, Committee Doc. Ref.: 5700-1.35/P1-13, 1-2-#0281.]

Despite the concern voiced by the independent consultants engaged by the Government to prepare the RFP that its response period was too short, the Government stuck to the 90-day deadline. Mr. Power testified that this decision was made directly by the Minister:

Mr. Power: We received direction from the minister that the response period would be 90 days. [*Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:34.]

This testimony is confirmed by a review of the documents produced for the Committee. A memorandum of August 21, 1991 supports Transport Canada officials' understanding of "the Minister's recent direction with respect to the redevelopment of Terminals 1 and 2." It includes: (1) direction to proceed with "a single stage proposal call process, i.e. no Expression of Interest or Qualification stage;" (2) "the RFP will require that proposals be submitted 90 days from release of the RFP;" and (3) "the RFP may be released prior to completion of the EARP review of the Department's proposal to construct new runways at LBPIA." [Memorandum from L.A. McCoomb to Mr. V.W. Barbeau, dated August 21, 1991, Committee Doc. 001047, emphasis added.]

Eventually, the 90-day period was extended at the request of Claridge, for 30 days. However that extension was requested half-way into the original 90-day period. That is, other parties who may have considered entering the contest but were dissuaded by the short response time, were not helped by this extension. The extension was for a further 30 days.

Mr. Allan Crosbie, a financial advisor who assisted Mr. Nixon in his review of the Pearson Airport deal, was concerned about the "process and the rigour with which Transport Canada identified bidders; and it came through to us as not a terribly professional and sophisticated process of identifying bidders." [*Committee Transcript*, Wednesday, September 27, 1995, Issue No. 26, 26:81.] He went on to criticize the way the RFP was presented, suggesting it was not presented in a way calculated to excite interest in most potential bidders:

"[T]here is a way to present deals to enhance your interest as a seller, in this case the government was the seller, and if you look at the RFP it is a very dry document.... It is not a package that is written from the point of view of explaining to somebody why this is an attractive deal in setting forth the deal and how they are going to make some money and how they can finance it and the amount of money they can make and all the advantages. **So that the packaging [of the RFP] was not the kind of packaging that you would see if you were really trying to do a deal and maximize value and interest people in what you've got.**

...
"[S]econdly, you have got to have a very strong process to identify bidders, create bidders, approach bidders, show them how they should do the deal, help people in the consortium to get together. And, once again, I don't think that was done and that was in our mind anyway -- ... In our mind that was confirmed and was told to us by officials from Transport Canada." [*Committee Transcript*, Wednesday, September 27, 1995, Issue No. 26, 26:81-82.]

This testimony conforms with the evidence presented to the Committee: the Government was satisfied that two or three interested parties had made themselves known, and did not worry about trying to seek out others. Of course, the RFP by its terms may have disqualified one of these parties (British Airports Authority). The final result was that the other two parties merged.

The Role of an LAA Under the RFP

The RFP was ambiguous as to whether or not a LAA was qualified to respond. Mr. Gardner Church told the story:

"When the decision was made by the federal government to proceed with the call for proposals... the provincial government agreed to underwrite, if necessary, a bid that was designed to return the policy control of the airports to the public sector[.]

...

"[A]n initial effort that might have produced a credible bid was undertaken. It became obvious almost instantly that given the nature of the call for proposals, which required very detailed drawings and detailed electrical analysis as to what one would do with communications facilities, with the administration building, with a variety of other issues, that a complete proposal in that time frame would be very difficult.

"Nonetheless ... an enormous effort [was made] to make it happen. It really was not until they were informed by the federal government that their bid would not be accepted because of what they perceived as provincial involvement that they turned their material over to another group which ultimately did put a bid in on their behalf." *[Committee Transcript, Tuesday, July 25, 1995, Issue No. 5, 5:24-25.]*

Mr. Meinzer stated later that "it was not clear to us, and we tried to get a clear answer, whether an airport authority was even permitted to bid. To this day, I do not know a clear answer to that question yet, whether an airport authority was in the end actually permitted to bid or not." *[Committee Transcript, Tuesday, July 25, 1995, Issue No. 5, 5:27.]*

What these individuals did not know about at the time, was the lobbying effort conducted against them by Paxport. At meetings with Transport Canada officials, Mr. Hession argued that, "Municipalities and prospective Local Airport Authority (LAA) candidates should be precluded from bidding." *[Memorandum from Mr. Ray Hession to Mr. Don Matthews, Mr. Jack Matthews, Mr. Lorn Sinclair and Mr. Trevor Carnahoff, dated April 16, 1991.]*

Mr. Hession later reported to his employers that Transport Canada "officials affirmed that proposals from municipalities, whether alone, in groups or in joint ventures with private interests will not qualify under the forthcoming proposal call for Terminals 1 and 2."

[Memorandum from Mr. Ray Hession to Mr. Don Matthews and Mr. Jack Matthews, dated May 14, 1991.]

Paxport and the RFP

In the meantime, Paxport was preparing its response to the RFP. Mr. Hession provided the Committee with notes he had distributed for a Paxport strategy session. These give insight into Paxport's understanding of its position relative to its competitors. [See: Memorandum from Mr. Hession to Mr. Don Matthews, Mr. Jack Matthews and four others, dated March 19, 1992.]

Those notes rate Paxport's competitive assessment *vis-à-vis* the anticipated competitors. The assessment varies from "weak," "OK," to "strong." Even at this stage, Paxport itself assessed its financial position as weak; next to the criteria, "Adequacy of proposed financial arrangements to ensure completion of the development phase," Mr. Hession entered "Weak." Similarly, Paxport's "financial planning experience and financial capability" were graded as "weak;" likewise its "ability to raise equity/debt on favourable terms."

Switching Sides: Mr. Andy Pascoe

While it was preparing for the RFP, Paxport acquired a new employee, Mr. Andy Pascoe. He came to Paxport from the office of the Hon. Doug Lewis, where from March 1990 until April 1991, while Mr. Lewis was Minister of Transport, Mr. Pascoe had served as his Special Assistant, Aviation and Airports, acting "as a liaison between the Minister and Transport Canada officials on policy issues surrounding airport management and operations." He told the Committee that while at Transport Canada, he was responsible for "a wide range of files pertaining to Pearson Airport." [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:37.]

The evidence shows that Mr. Pascoe, representing the Minister's office, attended meetings with each of the potential developers for Terminals 1 and 2. [Committee Doc. 001114] Mr. John Desmarais testified that "all the unsolicited proposals we were looking at were sent to the minister's office and then subsequently sent to the deputy." [Committee Transcript, Tuesday, August 15, 1995, Issue No. 11, 11:84.] In the circumstances, it is evident that Mr. Pascoe had access to confidential information about Paxport's competitors, possibly including information about the unsolicited proposals submitted by each, and their strengths and weaknesses as perceived by Transport Canada officials.

It is also evident that Mr. Pascoe had access to inside information about the priorities and concerns of the department with respect to the Pearson redevelopment project. All this

information could give Paxport a "competitive edge" in preparing and submitting its proposal -- to say nothing of the appearance of conflict arising from the possibility that Mr. Pascoe had not cut all ties to the Transport Minister's office and officials in the department.

Whether or not technically Mr. Pascoe's actions violated the *Conflict of Interest and Post-Employment Code for Public Office Holders* was not an issue before this Committee. **However, we have serious concerns about the fairness of a process that allows an influential insider -- the person from the Transport Minister's office who was responsible for briefing and advising the Minister on the redevelopment project -- to join one of those firms bidding for the contract.**

Evaluation of the Proposals: Setting the Criteria

At the end of the Request for Proposals stage, there were only two qualified proposals: one from Paxport Inc.; the other from Airport Terminals Development Group ("ATDG"), in which Claridge was the dominant party.²⁶ These proposals were evaluated by a committee of Transport Canada officials headed by Mr. Ron Lane. Here again, the Minister of Transport's personal attention to this file was clear. Mr. Lane told the Committee that "the evaluation committee here I know was approved by the minister.... The weighting, if you like, and the complete evaluation documentation, was presented. The minister requested to see it. It was delivered to him." [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:59.]

The Minister of Transport had in fact participated actively in setting some of the evaluation criteria. Internal Transport Canada memoranda show that the Minister personally directed that certain points be taken into account in the evaluation process:

"This is to confirm my understanding of the Minister's recent direction with respect to the redevelopment of Terminals 1 and 2:

- ...
- (g) Industrial benefits including Canadian content and enhanced export potential are to be included in the project evaluation. The precise weighting for this "non-airport" related factor and the method of its

²⁶ A third proposal was received, from Morrison Hershfield, but it was eliminated from consideration as it did not meet the basic requirements: Morrison Hershfield did not include the requisite \$1 million deposit. Mr. Nixon met with representatives of Morrison Hershfield in the course of his review. He was told that the firm "originally responded to the request for proposals but decided not to provide the \$1 million deposit required as a condition of being considered for the simple reason that the company was of the impression, under the realities of the situation, that their opportunity for success was remote." [Statement by Mr. Robert Nixon, Committee Transcript, Tuesday, September 26, Issue No. 25, 25:9.]

evaluation are to be determined in consultation with other departments prior to the commencement of the evaluation.

- (h) [ATIP deletion] Thus, a detailed "Crown Construct" terminal design and financial analysis to serve as the basis for comparing the public versus private sector alternatives will not be undertaken. Rather the value of the T1/T2 development opportunity to the Crown is to be assessed by a qualified Management Consulting firm and will serve as the basis for evaluating alternatives." [Memorandum from L.A. McCoomb to V.W. Barbeau, dated August 21, 1991, Committee Doc. 001047.]

Paxport's lobbying had paid off. It had lobbied hard to persuade the government to "use the project as the basis for the creation of a viable Canadian airport development industry to promote both domestic competition and international market development." [See: "Questions for Transport Canada" appended to letter to the Hon. Doug Lewis, Minister of Transport, from Mr. Hession dated October 22, 1990, Committee Doc. Ref: 5700-1.35/P1-13, 1-2-#0281.] As discussed earlier, Paxport had lobbied hard to have the "return to the Crown" weighted very heavily in the evaluation.

And the Minister decreed that the Government would not undertake a detailed "Crown Construct" model to be used for comparison purposes. In other words, the evaluation committee (and indeed the Government) would not be in a position to compare the proposals with an alternative whereby Transport Canada itself would undertake the redevelopment.

This was a point that puzzled us considerably during these hearings: why was there no base case study as to what would happen if Transport Canada itself effected the necessary redevelopment? The answer was buried in the documents: because the Minister of Transport ordered that no such study be undertaken.

It is clear from the documents produced for the Committee, that Transport Canada felt that the lack of such a base case study severely undermined the value of the Evaluation Report on the proposals. An internal memorandum dated November 3, 1992, observed:

"The Proponent's Proposal would imply an attractive financial return to the government if all of its assumptions and conditions were realized. However, the Evaluation Report has made no comparison of the return to the government under the Proponent's proposal with a 'business as usual' assumption under a continued government operation of the airport. A so-called government base case was not undertaken as a part of the RFP exercise....

"Without a reasonable base case, based on "common methodology and assumptions," a determination cannot be made with confidence on whether the

Proponent's proposal would leave the government no worse-off financially than it otherwise would have been had it continued to operate the terminals." ["Considerations Related to the Potential Redevelopment of Terminals I and II," dated November 3, 1991, Committee Doc. 001445, emphasis added.]

Mr. Lane elaborated on the weightings given during the evaluation, testifying that the qualifications of each proponent was only 5 per cent of the weighting. [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:60.]

Accordingly, the financial qualifications of each proponent -- their ability to deliver on their proposal -- was barely considered in the evaluation process. Ultimately, this proved to be a fatal error: those who made the preferred proposal were not financially competent to deliver what they had proposed.

At the same time, the return to the Crown under each proposal was weighted very heavily; of the 40 per cent points assigned to the business plan, 50.6 per cent was allocated to the proposed return to the Crown. [See: "Proposal Evaluation Report," Committee Doc. 001765.]

Evaluation of the Proposals: The Report

The Evaluation Report noted that Airport Terminals Development Group (or Claridge) "has submitted a sound, conservative and achievable Business Plan, which recognizes the current financial realities of the airline industry in establishing a pricing strategy (low charges for the short-term, 1 - 8 years or so, rising only after Phase 1 construction is completed in 1998)." [Committee Doc. 001765, p. 90]

By contrast, Paxport "has ... chosen a far more generous approach to determining payments to the Crown, resulting in a very high return to the Crown. However, the critical assumption in the Business Plan is that a large portion of the capital costs as well as the payments to the Crown can be passed on to the airlines, and that it will be possible to renegotiate airline leases to conform to their pricing strategies and levels." [Committee Doc. 001765, p. 90]

The Report noted that, "Any of these matters could result in [Paxport] having to scale down the scope of the project or to delay redevelopment, particularly Stage 1. They could also cause reductions in payments to the Crown, as well as bring into question the financial viability of the proposal." [Committee Doc. 001765, p. 90]

The Report also recognized that the Paxport proposal would entail significant cost increases for the air carriers -- costs that the air carriers would then pass on to the travelling public:

"The major share of capital costs and increased operating costs (including payments to the Crown) due to terminal expansion will be allocated to air carriers. The PAXPORT revenue projections indicate that these costs will double from approximately \$30M to \$60M in the first year of the lease and increase by a factor of 4 during the first ten years of the lease...While recognizing the development must recover its costs and provide a reasonable return to the investors, both the amount and rapidity of increases to air carrier costs could be criticized by both domestic and international air carriers." [Committee Doc. 001765, p. 108-9.]

What emerges is that even as the Evaluation Report was being written, Transport officials saw potential problems in the Paxport proposal. That proposal was based on the assumption that the developer's costs, including the high return to the Crown that won the proposal's selection, could be passed through to air carriers, who in turn would pass them on to the travelling public. Thus, the travelling public would be subsidizing both the Crown's return and the costs -- and profits -- of the developer. It is notable that the Evaluation Committee were explicit in their Report that "any of these matters could ... cause reductions in payments to the Crown, as well as bring into question the financial viability of the proposal."

Nevertheless, the Evaluation Committee, adhering to the criteria, found the Paxport proposal the "best overall acceptable proposal." It also found the Claridge proposal acceptable. As became apparent under questioning, the likely impact of the proposals on the travelling public was not taken into account in the evaluation process. [Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:72.]

Evaluation of the Evaluation Report:

(1) Raymond, Chabot, Martin & Paré "Process" Audit

The Evaluation Committee report was subjected to an independent audit by an outside firm, Raymond, Chabot, Martin & Paré. However, it emerged from the testimony that these auditors were given a very restricted role. Mr. Robert L'Abbé, the author of the Raymond, Chabot report, was very clear when he testified: "We did not make any evaluation whatsoever.... [T]he only thing that we did is to see that every question was answered and that the methodology that was first prepared before the committee took over to make the evaluation has been followed..." [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:56.]

Thus, while two levels of "auditors" were imposed on the Terminal 1 and 2 process -- the Raymond, Chabot firm and the Price, Waterhouse one, which guarded the documents -- neither level of "auditors" was empowered to question the validity of the process which the Government had put in place. They simply enforced the letter of the process they were given.

(2) Financial Assessment: The Edlund Report

Mr. Harry Swain, Deputy Minister of Industry, Trade and Technology, told the Committee that in the fall of 1992 "my then minister, the Honourable Michael Wilson, became concerned about the negotiations over Pearson. Specifically, he was concerned with the financial competence of the bidders to perform on the long-term obligations being contemplated, and he asked me for information and advice." [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:5, emphasis added.]

Mr. Swain told the Committee that he discussed the matter with the Deputy Minister of Transport, Dr. Huguette Labelle, who agreed to allow two Industry Canada experts to have access to the records. Ms. Connie Edlund, C.A., Acting Director, Small Business Loans Administration, Industry Canada, undertook the job in October, 1992. She testified as to her conclusions:

"Basically, our findings were as follows: **In terms of financial soundness, we felt that the ATDG proposal was preferable. Our concerns with the Paxport proposal were numerous.** One of them was that the amount of equity in the Paxport proposal appeared insufficient and was significantly less than that proposed by ATDG.

"Furthermore, over \$39 million of the equity was to come from public offering in 1996, which may or may not have been feasible. They had forecasted that dividends of 10 per cent payable to the shareholders were forecasted to start immediately. A large portion, I think 16 per cent, of the capital costs were to be financed from internally generated cash flows from operations.

"The forecast revenues appeared overly optimistic. If circumstances did not unfold as forecasted, for example, in the event of capital cost overruns, failure of the public offering, operating cash shortfalls or something of this sort, we did not feel that the shareholders, particularly Matthews Group, the largest shareholder, would have the necessary financial resources to make up the difference. We felt that Paxport's forecasted management fees seemed very high." [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:6-7, emphasis added.]

Ms. Edlund subsequently elaborated on the management fees issue: "I think it goes without saying they seem to be very, very high, extremely high." [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:23.] She said:

"Well, the management fees, this is one that kind of got us a little bit. Because we started looking at it, and I believe in one of the schedules that support it, it actually shows the definite increase. In fact, I think if you look to the second last page of the report, it talks about the escalation in management fees that would be paid, and it increases substantially.

"We saw through the ATDG proposal it increased approximately 15 per cent being charged across the board, which seemed somewhat reasonable to us. However, we increased on Paxport the management fees as total rose from 1993 at 24 per cent to 1998 to 42 per cent and staying constant at 42 per cent. We felt that was quite high. So we made note of that.

"So we brought that up basically as a question, because certainly that combined with the dividends being paid out at 10 per cent and 42 per cent management fees, when you have a somewhat fragile situation concerning revenue projections and little bit of equity, we felt that on a financial basis that led us to be somewhat nervous." [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:10.]

The Edlund report observed that, "If Paxport's cash flows are generated at the rates it is forecasting, then these high levels of management fees will be of no concern. When taken with the shareholders' high dividend demands, however, they are, perhaps, an indication of rapacity." [Committee Doc. 002108, p. 4.]

Ms. Edlund observed in her testimony that Paxport lacked extensive experience in the airport development area -- her report noted that Paxport was "a company with few tangible assets and no real operations" -- which in her experience was a factor worthy of consideration. [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:17-18.]

When he testified before the Committee, **Mr. Jack Matthews acknowledged that he lacked any experience in operating or redeveloping airports. His only exposure to airports came from preparing the proposal for Terminal 3.** He told the Committee that most of the meetings he attended to lobby for support of Paxport's proposal would begin with people asking, "Jack, what business do you have in the airport business?" And his only response was to point to his unsuccessful attempt to win the Terminal 3 contract. [Testimony of Mr. Jack Matthews, Committee Transcript, Thursday, September 21, 1995, Issue No. 22, 22:130.]

Ms. Edlund's report also reviewed the financial state of the various proponents. With respect to the Matthews Group, it noted that "Since its inception in 1953 the company has

never reported an annual loss, but in the past two years it has barely broken even and at Dec. 31/91 its debt (current plus term) totalled nearly \$250 million." [Committee Doc. 002108, emphasis in original document.]

Ms. Edlund elaborated upon this point to the Committee: "We felt that [Matthews] were pretty tenuous at that point and time.... Basically, we are a little concerned too because given the economic situation at that point and time, we didn't see an awful lot of huge upturn in sort of the business that they were in, so that led us to be a little concerned, and obviously that is borne out to be true." [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:18.]

Ms. Edlund's concerns were well founded. The Matthews Group was petitioned into bankruptcy on February 9, 1994.²⁷

Ms. Edlund's report noted also that the Paxport proposal was demanding an "exclusivity" clause, "that guarantees [Paxport] that there will be no diversion of aircraft to other airports unless Lester B. Pearson International is maintained at full capacity. We did not see a similar demand in the ATDG proposal. We have no way of knowing if such a clause is reasonable or acceptable to Transport Canada." [Committee Doc. 002108, p. 4]

Ms. Edlund expressed her concern that while guaranteeing Paxport's revenue streams, this would create "a monopoly situation." [Committee Transcript, Thursday, July 27, 1995, Issue No. 7, 7:13.] It also would have made it impossible to develop the Mount Hope Airport in Hamilton -- a goal identified in the 1989 Government Strategy for the Future of Aviation in Southern Ontario, pursuant to which the Terminal 1 and 2 redevelopment project had been initiated. [Minister's Press Release No. 98/89, August 18, 1989.]

²⁷ While some people have suggested that the bankruptcy was a direct result of the cancellation of the Pearson Airport deal, this is far from clear. Representatives of the consortium pointed out frequently that there would not have been any cash flow accruing to the Matthews Group between October 1993 and February 1994. (Mr. Peter Coughlin: "[O]ver the first nine years of the lease...the partners of Pearson Development Corporation would have received no cash whatsoever." Committee Transcript, Tuesday, September 12, 1995, Issue No. 17, 17:15.)

(3) Financial Assessment: The Gauvin Report

In mid-November, 1992, the Deputy Minister of Transport received yet another study on the Paxport proposal, this one from Mr. Paul Gauvin, Assistant Deputy Minister, Finance and Administration at Transport Canada. This study was "an estimate of the financial implications, for the Crown, of redevelopment and continued operation of T1 and T2 by Transport Canada," compared to "the impact of accepting the offer made by Paxport." [Letter from Mr. Paul Gauvin to Dr. Labelle, dated November 13, 1992, Committee Doc. 001520.]

Mr. Gauvin summarized the conclusions of this study by saying that:

"[T]he Paxport proposal, as it now stands, would certainly leave the Crown better off financially, **but only at a very high cost to the airlines and travelling public.**" [Letter from Mr. Paul Gauvin to Dr. Huguette Labelle, dated November 13, 1992, Committee Doc. 001520, emphasis added.]

Notwithstanding all the concerns raised both internally and externally, the Government accepted the Paxport proposal. And indeed, an internal Treasury Board memorandum from this period observed cryptically: "This may be a done deal." [Interoffice Memorandum from Bill Cleevely to six Treasury Board officials, dated November 26, 1992, Committee Doc. 001267.]

The Announcement, December 7, 1992: Selection of the Paxport Proposal

The first evidence before the Committee of direct involvement by Prime Minister Brian Mulroney in this project is a memorandum to him from the Clerk of the Privy Council, Mr. Glen Shortliffe. That memorandum, dated November 16, 1992, reported on the status of the RFP process at that time, **three weeks before the announcement of the selection of the Paxport proposal.** Mr. Shortliffe wrote to the Prime Minister:

"Transport has identified a number of issues to be considered before proceeding:

- the recession is continuing longer than expected and traffic may decline due to the current airline industry situation so the need for the expanded terminal space has slipped 2 to 3 years. There is no need to start construction until 1996.
- it had originally been expected that construction might start next year. Transport's current estimate is now 1994 at the earliest as it will take a minimum of 12 months to negotiate the lease. Paxport will have to

-
- negotiate new leases with the carriers and other T1/T2 tenants and arrange financing before signing the lease;
 - Carriers' costs would double to \$60 million in the first year and increase by a factor of four in ten years. Air Canada has asked that the redevelopment be postponed.
 - a Local Airport Authority (LAA) may be established for Pearson. The five regional chairmen, led by Metro Toronto, have written to Mr. Corbeil indicating their intention to proceed with the LAA process. The LAA would assume any lease for T1/T2. There may be pressure from the province for a postponement until the LAA can be established.

"The successful developer, Paxport, has made an unsolicited proposal for an early start of the project. For an unspecified nominal payment, it would be assigned the \$20 to \$30 million in rent from existing concessionnaires for 40 years in exchange for \$150 million in work which would start next year. **There is concern with the inequity of the arrangement (over \$1.0 billion in revenue in exchange for only \$150 million in work) and the negative impact it would have on government revenues (the lost \$20 to \$30 million in annual revenue would affect the deficit).** As well, access to the concession revenue represents the main incentive to complete the development. With immediate access, **Paxport will have little incentive to complete the project on terms acceptable to the federal government.**" [Memorandum for the Prime Minister from Glen Shortliffe, dated November 16, 1992, Doc. 002188.]

At the bottom of the Novemer 16, 1992 memorandum to the Prime Minister is a handwritten note which reads:

"Prime Minister: As the material indicates, there are few incentives for the bidders to get together. As discussed last Thursday, I'm looking at bid compensation."

So we see that that three weeks **before** the Minister of Transport announced that Paxport's proposal had been selected for the project, the Prime Minister was aware that no construction was required for four more years; that air carriers' costs would quadruple under the terms of the proposal; that Air Canada had requested that the project be postponed; that the province wanted to wait until an LAA could be established, and that was imminent; and that the arrangement was inequitable -- "over \$1.0 billion in revenue in exchange for \$150 million in work," all of which would have a "negative impact ... on government revenues" and affect the Government's deficit.

Furthermore, the Prime Minister and the Clerk were discussing the possibility of the bidders "get[ting] together" -- something that the parties testified was not contemplated by themselves until after the announcement on December 7.

Mr. Shortliffe provided the Committee with a curious explanation of his handwritten note:

"It is not infrequent for Prime Ministers to ask questions of the Clerk. This is an instance where I was responding to a question that I had been asked by Prime Minister Mulroney. It came about basically in the following fashion. Before this memorandum was prepared, the Prime Minister knew from me orally that the best overall proposal emerging from the evaluation process was indeed Paxport. He knew that because I told him that orally.

"It so happened that a couple of days before this memorandum was prepared the Prime Minister was at a social function and at that social function he encountered Charles Bronfman.... [O]f course, at that time no announcement had been made as to who had won the best overall proposal; and Mr. Bronfman, as I understand it, in the course of their social discourse, made, frankly, a pitch at the Prime Minister about the importance to Claridge of winning the bid for Pearson redevelopment.

"As a result of that discussion, the next morning when I met with the Prime Minister, the Prime Minister asked me whether or not there was any possibility that once the announcement was out that the two could be -- would -- could come together so that everybody could get a piece of the action." [Committee Transcript, Monday, September 25, 1995, 1400-9, emphasis added.]

And several days after "the announcement was out," it came to pass that the two proponents did "come together so that everybody could get a piece of the action." The Prime Minister's hopes were realized.

The Prime Minister's involvement with this project seems at times to have exceeded that of the Minister of Transport. Mr. Corbeil told the Committee, in forceful terms, that he had "absolutely no memory, no knowledge, no indication" of a possible merger between the parties, until the merger was announced. [Committee Transcript, Wednesday, September 20, 1995, Issue No. 21, 21:24.]

It was also clear from Mr. Corbeil's testimony that the Prime Minister's desire to try to provide compensation for the bidders if the redevelopment project was cancelled was addressed by the Clerk without consulting or involving the Minister of Transport. [Committee Transcript, Wednesday, September 20, 1995, Issue No. 21, 21:24.]

On December 4, 1992, three days before the announcement, Mr. Shortliffe sent another memorandum to the Prime Minister. [Committee Doc. 002184] This memorandum reiterates the point that "the redevelopment of the terminals may impose a significant financial burden on the airline industry at a time when it is in financial difficulty." This memorandum also discusses Paxport's financeability problems, and in particular the possibility that Paxport would return to the Government "within a matter of weeks," saying that their proposal is not workable. Mr. Shortliffe wrote:

"There are concerns that Paxport may not be able to confirm the financing of the project as it effectively requires the consent of Air Canada, the principal T2 tenant, who is known to be opposed to the redevelopment. Hence, within a matter of weeks Paxport could very well be back to us indicating that their proposal is not workable under current circumstances in the airline industry. At that point the government would have to consider putting the whole project on hold until a later date."

At this point, Mr. Shortliffe inserted an asterisk, with the handwritten comment:

"PM: However, the government could consider other alternatives."

Mr. Shortliffe noted also in the memorandum that "ATDG would of course be arguing publicly that their proposal could have been financed."

We are compelled to ask why, in these circumstances, the Government decided to proceed with the selection of the Paxport proposal. It is clear from these memoranda that Transport officials were pointing out the general problems with proceeding at that time, and, even worse, the problems that would arise from selecting the Paxport proposal over that of ATDG.

It is equally clear from these memoranda that the matter was placed squarely before the Prime Minister. And yet while the Prime Minister was kept apprised by the Clerk of concerns within the Department of Transport and the fact that the government might "have to consider putting the whole project on hold until a later date," the Minister of Transport told the Committee that he never discussed delaying the project to a later date:

Senator Bryden: As of the 4th of December, as the minister responsible, had any discussion ever taken place that you would have to put the whole project on hold for a later date?

Mr. Corbeil: No, sir. [Committee Transcript, Wednesday, September 20, 1995, Issue No. 21, 21:24.]

As Senator Michael Kirby observed in the course of Mr. Corbeil's testimony, "The minister was not in the loop." [Committee Transcript, Wednesday, September 20, 1995, Issue No. 21, 21: 78.] The same cannot be said for the Prime Minister.

IV. FINANCEABILITY PROBLEMS: THE EMERGENCE OF MERGEKO

On December 7, 1992, Mr. Jean Corbeil, Minister of Transport, announced that the Paxport proposal was "the best overall acceptable proposal" for the redevelopment of Terminals 1 and 2. However, neither the announcement nor the letter to Paxport was unconditional in its endorsement of the proposal. Both required Paxport to "demonstrate to the satisfaction of the government by February 15, 1993 that [Paxport's] proposal, in the circumstances, is financeable." [Letter from Victor Barbeau to Ray Hession, President, Paxport Management Inc., dated December 7, 1992, Committee Doc. 001844.]

The effect of this decision was to put Paxport in a vested position. Although Paxport's ability to carry out its proposal was uncertain, the Government had announced that it was going to negotiate a deal with Paxport and with no one else. At the same time, Claridge would have to go to Paxport unless it was to forego the benefits of having all three terminals operated by it or by a friendly company -- which Claridge told the Committee was its sole motivating factor in acquiring majority control of Terminal 3 in the first place.

Paxport quickly discovered that it could not raise the necessary financing. Mr. Jack Matthews told Mr. Robert Nixon "that he had gone up and down Bay Street looking for finance, that he had gone to the banks, that he had gone to the pension funds and had been unsuccessful in raising the financing that he sought." [Testimony of Mr. Robert Nixon, Committee Transcript, Tuesday, September 26, 1995, Issue No. 25, 25:72.]

For a few days in December 1992, things moved rapidly as the two competing bidders were getting together to form a new company, Mergeko. But how these two parties came together remains mysterious. The Committee originally heard two somewhat inconsistent versions of the origin of Mergeko. The documentation raises questions about the veracity of these accounts.

According to Mr. Ray Hession, former President of Paxport, "within two or three days of the announcement of the award," a "senior official from Transport Canada" approached Mr. Hession and suggested Paxport "should explore the synergies with the Terminal 3 owners." [Testimony of Ray Hession, Committee Transcript, Wednesday, August 2, 1995, Issue No. 9, 9:46, 44.] It was evident when he testified that this was Mr. Hession's understanding of the origin of Mergeko.

When he testified, Mr. Hession refused to disclose the identity of this senior official, citing a personal pledge that forbade him to identify the person. [*Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:44, 46.] However, several months later he wrote to Mr. John Nelligan, legal counsel to the Committee, and said that it was Dr. Huguette Labelle, then Deputy Minister of Transport, who had made this suggestion. [Letter from Mr. Hession to Mr. Nelligan, dated November 9, 1995.]

Every Government witness acknowledged that this file was an important, high profile one for the Government, one which was being supervised very closely by the Privy Council Office, as the documents demonstrate. It strains credulity to believe that on this closely-watched file, a senior civil servant would take it upon herself to approach the only two proponents, and suggest they explore the "synergies" of merging -- unless, of course, that civil servant was directed to do so, or understood that, at least, she had the blessings of those "higher up."

Meanwhile, both Mr. Peter Coughlin, President of Claridge Properties Ltd., and Mr. Don Matthews, Chairman of the Matthews Group of companies, testified that the merger had its genesis in a telephone call from Mr. Matthews to Mr. Bronfman on "the 10th or 11th of December," in which Mr. Bronfman proposed a merger between the two companies. [*Committee Transcript*, Tuesday, September 12, 1995, Issue No. 17, 17:21.] While Mr. Hession's letter explains that this telephone call was the result of his conversation with Dr. Labelle, and that he and Mr. Matthews sat "for about an hour" discussing the merits of Dr. Labelle's suggestion, Mr. Matthews testified that he did not recall any discussion with Mr. Hession about such a conversation between Mr. Hession and a Transport official; indeed, Mr. Matthews said that he deliberately did not tell Mr. Hession about the merger discussions, because "he was not in that loop." [*Committee Transcript*, Wednesday, September 13, 1995, Issue No. 18, 18:110-11.]

This is not to suggest that Mr. Hession was being anything less than forthright with the Committee. Indeed, other Government documents strongly support his rendition of events. A document entitled, "Terminal Redevelopment Project Lester B. Pearson International Airport: Meeting Notes," describes a meeting which took place on Thursday, March 18, 1993 in the boardroom of the Deputy Minister of Transport, and which was attended by twelve Department of Transport officials including Dr. Huguette Labelle, Deputy Minister of Transport, and Mr. David Broadbent, Chief Negotiator. One of the listed "points of note" states:

"Clear indication that the joint venture is a product of the Government (PCO/politicians)." [Meeting Notes, Committee Doc. 00007.]

Of course, we already know that the Prime Minister had asked the Clerk of the Privy Council to explore just such a possibility even before the RFP results were announced. [See Memorandum to the Prime Minister from Mr. Glen Shortliffe, Clerk of the Privy Council, dated November 16, 1992, Doc. 002188.]

How the merger came about is less important than *why*: the secrecy surrounding its origins simply highlights the fact that all the parties involved were aware that something out of the ordinary was going on.

Mr. Coughlin told the Committee that Claridge only purchased a controlling interest in Terminal 3 when the Government announced its intention to privatize Terminals 1 and 2. As he expressed it, "We did not want to operate just one piece of the pie. To us, operation of all three terminals was necessary in order to diversify our risk across the terminals; to produce significant operating and financial synergies; and to enhance our economic return." [Committee Transcript, Tuesday, September 12, 1995, Issue No. 17, 17:12.]

The selection of Paxport's proposal by the Government gave Paxport a highly marketable right. Mr. Coughlin was very clear as to what Paxport brought to the bargaining table with Claridge: "[T]hey brought the right to negotiate 1 and 2." [Id., 17:28.] He also testified that Claridge valued the right to negotiate the Terminal 1 and 2 contract at between \$20 million and \$35 million. [Id, 17:30.]

Thus the mere awarding of the right to negotiate gave Paxport an asset for which it had paid nothing except the cost of lobbying and of responding to the Request for Proposals. And the results of the merger were crystal-clear: Paxport remained "in the game," and the Prime Minister's hopes were realized -- everyone got "a piece of the action."

Apparently Mr. Hession's role at Paxport changed once Paxport's proposal won the RFP process. On December 7, 1992, the company, in Mr. Hession's words, "constructively terminated" his employment. [Committee Transcript, Wednesday, August 2, 1995, Issue No. 9, 9:15.] However, four days earlier Mr. Hession and Paxport had concluded a "post-employment package," under which Mr. Hession was to receive \$83,750 each year for the rest of his life (and if he predeceased his wife, she would then receive \$41,875 every year for the rest of her life), and a special bonus of \$120,000 on signing the Pearson redevelopment agreement with the Government. [Committee Transcript, Wednesday, August 2, 1995, Issue No. 9, 9:15.]

This pension -- which is unquestionably generous, especially considering Mr. Hession only worked for Paxport for **four** years -- is currently the subject of litigation between Mr. Hession and Paxport, and so the Committee was unable to learn more about it

when Mr. Hession testified. However, it is clear from the Statements of Defence filed with the court that Pearson Development Corporation and T1T2 Limited Partnership believed that the money to pay this "pension" to Mr. Hession was to come from the Pearson Airport redevelopment agreement with the Government. They claimed:

"If these Defendants [Pearson Development Corporation and T1T2 Limited Partnership] were ever bound by the Contract, which is explicitly denied, the Contract became impossible to perform when the Federal Government refused to perform the Airport Contracts. These Defendants could not redevelop, operate or manage Terminals 1 and 2 Complex. The Plaintiff could not perform services contemplated by the Contract. The Contract therefore became impossible to perform without any fault on the part of these Defendants and the Contract was thereby frustrated. These Defendants were discharged from any obligations under the Contract." [Statement of Defence filed on behalf of Pearson Development Corporation and T1T2 Limited Partnership with the Ontario Court (General Division), Court File No. 80004/94, para. 13, emphasis added.]

What Mr. Hession viewed as a pension -- for which one does not usually provide services, since it is given in recognition of services provided in the past -- was evidently viewed by the consortium as a cost of redeveloping, operating and managing the Terminals 1 and 2 Complex. In other words, while Mr. Hession apparently had no intention of providing services at the Terminals, the consortium would have written off the pension payments as a business cost -- money skimmed off the top of revenues from Pearson, before even calculating the profits to accrue to the consortium. This was only the first of what became a stream of arrangements disclosed to the Committee, by which members of the consortium would have diverted revenues from the most profitable airport in the country to themselves, over and above the rate of return negotiated with the Government.

The Doucet Lobbying Contracts

Paxport then engaged another lobbyist, Dr. Fred Doucet. Dr. Doucet had impressive credentials: he is known to be an old and close friend of the Mr. Mulroney; he served as Mr. Mulroney's Chief of Staff when the latter was Leader of the Opposition; and then he served as the Senior Advisor when Mr. Mulroney became Prime Minister. [*Committee Transcript*, Thursday, August 24, 1995, Issue No. 16, 16:54.] Mr. Doucet registered as a lobbyist for Paxport Inc. on December 23, 1992. He testified that while his contracts with Paxport were not signed until February 1, 1993, they took effect in late December 1992. [*Committee Transcript*, Thursday, August 24, 1995, Issue No. 16, 16:69.]

There were two contracts: one with Paxport Inc., and the other with Paxport International. Together, they would have paid Dr. Doucet more than \$2 million over a ten-

year period.²⁸ As Senator Grafstein described the contracts when Dr. Doucet appeared before the Committee, "It's a ten-year fixed contract. No cut, no change, no variation, no ability of any party to change it." [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:94.]

Mr. John Nelligan, Counsel to the Committee, agreed: "[T]here appears to be no provision here for amendment or cancellation within the terms specified." [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:95.]

Dr. Doucet denied that he was engaged to lobby for Paxport in the contract negotiations on-going in 1993. He would only acknowledge that these \$2 million contracts were "going to be triggered at the moment that the new management team...moved...to Pearson Airport Terminals 1 and 2." [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:66.]

He claimed that, "The Paxport Incorporated contract [worth \$1,044,000] was intended primarily to advise on other Canadian airport opportunities as the airports devolution program progressed over the next decade." [Id., 16:58.] He elaborated: "[T]he list of Canadian airports that were targeted for devolution was 25; 25 airports in Canada. At that point, if my memory serves me right, there was only Vancouver that was officially LAA'd, as it were." [Id., 16:66.]

In April 1992, however, the Government had announced the signing of LAA agreements for each of the Vancouver, Montreal, Edmonton and Calgary International Airports. [Press Releases dated April 1992, Committee Doc. 00015.] In other words, by December 1992 there were no more major Canadian airports to be devolved -- they had all already been "LAA'd," to use Dr. Doucet's term. **One is forced to wonder why, with the Conservatives at a record low in the polls, and with an election imminent, Paxport would sign a prominent Conservative lobbyist to a ten-year no-cut contract to lobby a future government -- most probably, a Liberal government -- for the devolution of airports that did not exist.**

According to Dr. Doucet, the second contract, with Paxport International, worth \$960,000, was for his anticipated assistance "in developing international markets to promote

²⁸ Dr. Doucet testified that half the fees from one of these contracts was to go to another firm, named "Sagegate Incorporated." He stated that, "Sagegate's principals had a key involvement in the redevelopment of the Pittsburgh International Airport and other international development projects." [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:58.] However, a corporate search revealed only a Sagegate Corporation, an Ontario company incorporated December 29, 1992 -- the precise time Dr. Doucet's contracts with Paxport began. The only principal entered on the official records of the company is a Mr. Frank Salvati, of North York, Ontario, who when telephoned by the media declined to say anything about the activities of Sagegate.

and position Paxport's airport development technology outside Canada." [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:58.]

The timing of this arrangement also is surprising. The contracts were signed at a particularly precarious point for the Matthews Group. They had successfully lobbied to have their proposal for the redevelopment project selected, only to discover they could not finance it alone and would have to relinquish at least half (it ended up being more) to their competitor. A disinterested observer might have thought this was the time the Matthews Group needed lobbying assistance more than ever. **It is passing strange that they would agree to pay over \$2 million to one of the best connected lobbyists in the country, and yet not ask him to assist on this crucial task, particularly when, as we have seen, the Doucet contracts themselves were contingent on the consummation of the Pearson deals.**

The Committee was unable to learn about the nature of Dr. Doucet's lobbying activities on behalf of Paxport. While Dr. Doucet submitted invoices documenting that he billed Paxport Inc. \$10,000 a month for lobbying services²⁹, when asked whether he met or spoke with Cabinet Ministers, Chiefs of Staff, or Mr. Shortliffe, the Clerk of the Privy Council, Dr. Doucet replied: "I have no recollection." He admitted only to meeting with the chief of staff to the Minister of Transport. [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:83.] Yet Dr. Doucet was paid \$120,000 a year.

Not Financeable: The March 2, 1993 Deloitte & Touche Report

In mid-January, 1993, the Government retained the services of Deloitte & Touche, a well-known accounting firm, "to provide advice on the financeability of the [Paxport proposal to assume responsibility for Terminals 1 and 2] project." [Deloitte & Touche Report dated March 2, 1993, Committee Doc. 00190, page 1.]

As of February 1993, the various members of the Paxport consortium had committed to contribute equity of over \$57 million; however, only \$4,426,775 had actually been

²⁹ Dr. Doucet maintained that these invoices related "to a contract which our firm had entered into on May 4, 1992 with two construction subsidiaries of Matthews Contracting Incorporated Limited, Coolsaet of Canada Limited and Construction Angkor Incorporated for assistance in the promotion of the national highways system." [Committee Transcript, Thursday, August 24, 1995, Issue No. 16, 16:56.] But this does not explain why the invoices were made out to "Paxport Inc." -- especially considering that, as the lawyers for Paxport and Claridge repeated to the Committee many times, the partners in the T1T2 consortium were prohibited from incurring "any liability, contingent or otherwise, of a material nature that does not relate directly or indirectly" to the operation and development of the Pearson Airport terminals. [See, Submission to the Committee from Messrs. Coughlin, Vineberg and Spencer, dated September 8, 1995.] Therefore, either Paxport Inc. was engaged in activities it should not have been involved in (if indeed they were unrelated to Pearson), or Dr. Doucet's activities for which he invoiced Paxport Inc. were indeed related to Pearson Airport. He cannot have it both ways.

advanced.³⁰ Of particular concern to Mr. Paul Stehelin, the partner at Deloitte & Touche responsible for the file, were \$20 million to be contributed by Matthews Group Limited. The documents provided to the Committee included a memorandum dated February 11, 1993 from Mr. Stehelin to his Paxport file, reporting on a telephone conversation he had had that morning with Mr. Don Matthews. Mr. Stehelin asked Mr. Matthews to clarify a statement that "[Matthews Group Limited] has made separate arrangements with one of its affiliated companies to fund \$20 million that is to be invested on the turnover date." Mr. Stehelin's memorandum vividly describes Mr. Matthews' response:

"Mr. Matthews' answer was that they had arranged the money and that's what the letter said, so there shouldn't be any problem. I indicated that we were being asked to give an opinion on the availability of these funds to Paxport at the turnover date via the Matthews Group. I stated that he should assume that we were acting in an audit capacity and therefore it was important that we be satisfied that these funds were, in fact, available.

"Mr. Matthews asked whether I was indicating that he wasn't telling the truth, I said "No, it wasn't a question of truth or not, it was just a question of satisfactory independent evidence with respect to the availability of the \$20 million."

"After a very brief discussion, I said for example, "if the Royal Bank, which had indicated that you operate an eight digit operating line, were to indicate \$20 million was available upon suitable terms being met, i.e. agreement to your proposal with the government re: Terminal 1 and 2, this would be ideal." There was no response. He took my name and telephone number and indicated that someone would get back to me." [Memorandum from Mr. Paul Stehelin to "Paxport File," dated February 11, 1993, Committee Doc. 00188.]

In fact, as the Committee discovered, Mr. Matthews knew full well where the \$20 million was coming from: on June 10, 1992 -- while it was preparing its response to the Request for Proposals -- Paxport and the Matthews Group had concluded an agreement with Allders International Canada Limited, pursuant to which Allders agreed both to put up \$15 million directly to the consortium, and to lend Paxport Investments Ltd. \$20 million. Of particular interest were the terms of that loan. If Paxport Investments Ltd. defaulted on the loan, Allders would have received its shares of Paxport -- giving Allders effective control of Terminals 1 and 2.

³⁰ It is significant, in considering the financeability of the proposal at this time, to bear in mind Paxport's oft-stated goal of beginning construction by the end of April, 1993. [See, eg, the Transport Canada memorandum, "Notes from meeting of December 15, 1992," Committee Doc. 000366, commenting that "Messrs Hession and Matthews noted that ... they were targeting on getting a shovel in the ground by April 30, 1993, but acknowledged this might be difficult."]

In a letter to Mr. Victor Barbeau, Mr. Stehelin reviewed the financial reports of the Matthews Group Limited, and observed:

"Based on the financial information provided at November 30, 1992, we are unable to determine whether Matthews Group would be in a position to fund the \$20 million were it not for its Heads of Agreement with Allders International Canada." [Letter from Mr. Stehelin to Mr. Barbeau dated February 22, 1993, Committee Doc. 00196.]

This arrangement with Allders caused significant consternation to Mr. Stehelin at the time, and to us reviewing this deal, for several reasons. First, Allders operated duty free shops, and would have had a 25-year lease to operate the duty free shops at Terminals 1 and 2. Mr. Stehelin testified he was greatly concerned at the prospect of having a major tenant control the airport.

Second, the Request for Proposals had stipulated that only those developers who were Canadian and were controlled in fact by Canadians, qualified to submit proposals. Indeed, this was a limitation hard fought for by Mr. Hession on Paxport's behalf, in his concerted efforts to prevent British Airports Authority from submitting a bid. [See: Request for Proposals, March 1992, page 35.]

Allders International Canada Limited was owned 51% by Agra Industries, a Canadian company, and 49% by Allders PLC, a British company. However, as Mr. Stehelin testified, no one knew whether in fact Allders International Canada Limited was controlled by Canadians, or whether the British company actually controlled it.³¹ [Committee Transcript, Thursday, August 17, 1995, Issue No. 13, 13:24-25.]

It is interesting to speculate what reaction the Evaluation Committee considering Paxport's proposal would have had, had it known of the Paxport-Allders agreement. As the above documents demonstrate, the Matthews Group was far from keen to disclose the terms of the agreement.

On March 2, 1993, Deloitte & Touche issued its report. **Its conclusions were unambiguous: they could not assure the Government that Paxport's project could be financed.**

³¹ And indeed, the Committee was shown Government documents that suggest the British parent company, Allders Ltd (PLC), did subsequently acquire some or all of Agra Industries' share in T1T2 Limited Partnership. See: "The Matthews Enigma," Committee Doc. 001109.

They noted that:

"When the initial Request for Proposal was issued and responses received, the expectation was that PAXPORT would be able to finance the total project outright. In our view, PAXPORT cannot finance the entire project at this time.

"This fact is inherently acknowledged in that their proposed approach is to finance the project on a "finance-as-you-go" basis through staged redevelopment." [Report of Deloitte & Touche dated March 2, 1993, Committee Doc. 00190, page 3.]

The report concluded:

"On the basis of our work to date, it appears that **the original intent of the Request for Proposals has been altered somewhat by PAXPORT to accommodate its need to finance this redevelopment on a "finance-as-you-go" basis.** The composition of the consortium has changed significantly since the receipt of the Proposal and the Department has yet to receive full and complete details of these changes; however, it appears that most of the equity for the first stage of the project would be available. While there is a high probability that the debt financing for the first stage could be placed, it is very conditional on the resolution of significant outstanding issues by PAXPORT. There are also questions regarding a number of assumptions about the role of the Crown which should be resolved.

"Until these issues, particularly those where the onus is on PAXPORT are resolved, we cannot provide assurance to the Crown that this project can be financed." [Report of Deloitte & Touche dated March 2, 1993, Committee Doc. 00190, page 6, emphasis added.]

This report caused an uproar. The next day, March 3, 1993, Paxport representatives (Mr. Ray Hession, Mr. Jack Matthews, and Mr. Peter Kozicz) met with Dr. Huguette Labelle, Deputy Minister of Transport, Mr. Keith Jolliffe, Mr. Green and Mr. Richard LeLay, Chief of Staff to the Hon. Jean Corbeil, Minister of Transport. The Transport Canada memorandum of the meeting reported statements by Mr. Hession that "TC was using the wrong people, i.e. Deloitte Touche." It continued:

- Hession presented the DM with a letter to sign (DM to PAXPORT) stating that TC officials were being directed to begin discussions on March 4.
- The DM did not accept the letter and said she never thought she would see the day when Hession was her executive assistant!!.. Also TC was not "going to roll over," PAXPORT should talk to Deloitte Touche on Friday after which TC would seek direction on the project from the politicians." [Memorandum entitled "Telcon Between Driedger/Heed/Desmarais and Barbeau/Jolliffe," March 4, 1993, Committee Doc. 00189.]

The memorandum notes several "Other Comments on the Situation," including:

- ADM's view is that Shortliffe is trying to orchestrate something but not sure what
- Lobbyists are abuzz
- Many not-so-well-veiled threats during the meeting." [Memorandum entitled "Telcon Between Driedger/Heed/Desmarais and Barbeau/Jolliffe," March 4, 1993, Committee Doc. 00189.]

Mr. Shortliffe refused to comment to the Committee on this suggestion as to his activities. [Testimony of Mr. Glen Shortliffe, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:81-82.]

Whether thanks to the lobbyists' activities, Mr. Shortliffe's "orchestration," or other connections, this meeting and particularly Mr. Matthews' concerns, were reported to the Prime Minister with lightning speed. On March 5, 1993 Mr. Shortliffe wrote a Memorandum for the Prime Minister, in which he detailed the concerns raised by Deloitte & Touche, underscoring their conclusion that "unless these issues are resolved, we cannot provide assurance to the Crown that the project can be financed." [Memorandum for the Prime Minister from Mr. Glen Shortliffe, March 5, 1993, Committee Doc. 002191, emphasis in original document.]

Mr. Shortliffe detailed Mr. Matthews' position as presented in the March 3 meeting, including, "Mr. Matthews questioned the need to demonstrate financeability at this point. He argued that Paxport's lack of progress on financing is the federal government's fault; in not unambiguously declaring it the winner in the RFP process, the government has undermined Paxport's credibility and negotiating position with Air Canada." [Memorandum for the Prime Minister from Mr. Glen Shortliffe, March 5, 1993, Committee Doc. 002191.]

Mr. Shortliffe's information for the Prime Minister was up to date: he reported in the memorandum on a meeting Paxport had held that day, March 5, with Deloitte & Touche. He then noted, "An impasse could develop on the financeability question.... We have asked Transport to develop options in case an impasse develops."

In a separate, handwritten note at the bottom, Mr. Shortliffe added:

"Prime Minister: I've been having some conversations on this file on which I will report to you orally. GS."

When he testified, Mr. Shortliffe stated, "As I recall, I believe that handwritten note related to various discussions that were going on at the time with respect to the prospects for Mergeco." [Committee Transcript, Monday, September 25, 1995, Issue No. 24, 24:68.]

And indeed, Paxport's financeability problems were resolved by the merger with Claridge, whose "deep pockets" were accepted by Deloitte & Touche in their later, August 17, 1993 report, as more than adequate assurance of financeability. [Report of Deloitte & Touche dated August 17, 1993, Committee Doc. 00098.]

The Mergeco solution would have resulted in all three terminals at Canada's busiest airport being controlled by one private entity. All Mr. Hession's arguments against such a monopoly -- presented when Paxport was seeking to ensure that it won the redevelopment project over Claridge -- suddenly had lost their cogency, and were replaced by discussions of the "synergies" of having all three terminals operated by a single entity. **Once again, consideration for the increased cost to the travelling public was conspicuously absent.**

Concerns at the Treasury Board Secretariat

The Treasury Board Secretariat was also involved at this point. Its numerous memoranda show its strong concern with the way the project was progressing. On March 12, 1993, Mr. Mel Cappe, then Deputy Secretary, Program Branch in the Treasury Board, wrote a memorandum to Mr. Ian Clark, then Secretary of the Treasury Board. (Mr. Cappe explained to the Committee that Mr. Clark's position was equivalent to that of a Deputy Minister.) The memorandum outlined the history of the proposal process, and then described how Paxport and Claridge had "entered into this 'marriage of convenience' to protect their various interests." [Memorandum from Mr. Mel Cappe to Mr. I.D. Clark dated March 12, 1993, Committee Doc. 00304.]

Mr. Cappe reviewed the Deloitte & Touche report, saying:

"The report of Deloitte & Touche ... is very clear. Paxport is non-compliant with the RFP. Subsequent meetings between Transport, Paxport and Deloitte & Touche have not resolved any of the issues raised in the report.

..."
"Paxport officials (Messrs. Hession and Matthews) met with Mme. Labelle last week and expressed outrage at what they see as bureaucratic stalling.

"Paxport officials questioned the credibility of everyone, including Deloitte & Touche. They also raised their concerns that until they are declared "the developer" by Transport Canada, Air Canada would not take them seriously.

"Since last week, Paxport has increased their pressure via PMO and Ministers."
[Memorandum from Mr. Mel Cappe to Mr. I.D. Clark dated March 12, 1993,
Committee Doc. 00304.]

When he appeared before the Committee, Mr. Cappe elaborated on his statement that Paxport was "non-compliant with the RFP." He explained: "[Paxport] was non-compliant with the RFP in that the government was not able to grant the -- to do the deal, if you will, on the basis of the proposal it had before it because Deloitte & Touche had found that it was not financeable, or that the financeability was called into question." *[Committee Transcript, Tuesday, August 22, 1995, Issue No. 14, 14:22.]*

Mr. Cappe was also clear that while he had no personal knowledge of pressure having been exerted on people within the Prime Minister's Office and other Ministers, this statement "was what we understood was going to be happening," based on discussions with colleagues "in other departments, in the central agencies, and discussing the way the file was developing. And in the course of those discussions, we would have exchanged on what we understood to be happening." *[Committee Transcript, Tuesday, August 22, 1995, Issue No. 14, 14:28.]*

The memorandum proceeded to describe the "current status" of the matter:

"The Deloitte & Touche report is probably already public knowledge. Proceeding to negotiate on a sole source basis with Paxport now would be very difficult to justify." [Memorandum from Mr. Mel Cappe to Mr. I.D. Clark dated March 12, 1993, Committee Doc. 00304, emphasis in original document.]

This paragraph is perplexing: after the RFP process, why would negotiating on a sole source basis remain an issue? Mr. Cappe was enlightening in his testimony:

"[I]t was our view that [Paxport] were non-compliant as proposed. What we were doing... was the government was consulting with Paxport, insofar as Paxport was the best overall proposal, to see if they could get up over that hurdle, if you will, to become compliant and then if they were compliant, we would then get into the negotiations.

"What we were indicating here was that if there was an interest in negotiating on a sole source basis with Paxport that that would be subject to severe criticism because the other bidder was still live, as it were, by being on the table. The Airport Terminal Group [Claridge] had not withdrawn its bid at that point." *[Committee Transcript, Tuesday, August 22, 1995, Issue No. 14, 14:30.]*

In other words, Deloitte & Touche (Paxport, really -- Deloitte & Touche was merely the unfortunate messenger) had in effect placed the Government in a difficult position: by

demonstrating that Paxport could not comply with the RFP, the Government could not proceed to negotiate with Paxport while remaining true to the RFP process. The Government's position was exacerbated by Claridge, whose quiet presence, by means of its proposal (which remained "on the table" awaiting the recognition of the fact that Paxport's could not demonstrate financeability), served as a subtle check to ensure that the RFP process was upheld.

This was precisely the situation anticipated by Claridge. In a discussion in mid-December, 1992 with the Deputy Minister of Transport, Claridge was reported to have been "positive Paxport cannot finance and therefore will be observing closely and taking appropriate legal action if proposal changes." [Fax cover sheet from Mr. Michael Farquhar to Mr. Chern Heed, dated December 17, 1992, Committee Doc. 001540.]³²

In effect, the Government had four choices: (1) proceed to negotiate with Paxport, and bear the risk of a lawsuit; (2) declare that Paxport had failed to meet the financeability condition, and proceed to negotiate with Claridge as the next-best proponent; (3) bring Claridge "on side" with Paxport; or (4) wait for an LAA to be established, and proceed as with the other major Canadian airports.

This situation was succinctly expressed by the Treasury Board memorandum:

"This file is extremely messy, and in our view, it is unlikely any contract for construction could be struck within the next six months. Overall our preference would be to wait for the LAA at Pearson to be established, and for Transport to quickly transfer the responsibility for the terminal redevelopment and new runway projects (another possible problem file) to the LAA for execution. This is what is happening in Vancouver, where the LAA is currently proceeding with terminal expansion and a new runway." [Memorandum from Mr. Mel Cappe to Mr. I.D. Clark dated March 12, 1993, Committee Doc. 00304]

Trying to Merge Paxport's Proposal and Claridge's Pockets

Why did the Government go to such pains to keep Paxport in the game? The only answer offered throughout these hearings was that the Government preferred the Paxport proposal. However, as will be seen below, the final deal was far from the Paxport proposal. Indeed, this was recognized by the Government negotiators even before the "consultation"

³² Indeed, this was Claridge's original strategy as of December 7, 1992: to hope that the Government would impose sufficiently stringent financial conditions on Paxport that Paxport would fail, and the Government would turn to the next acceptable proposal, that submitted by Claridge. [See: Testimony of Mr. Harry Near, *Committee Transcript*, Wednesday, August 23, 1995, Issue No. 15, 15:99, and fax from Mr. Near to Mr. Glen Shortliffe dated December 7, 1992, 8:12 a.m., Committee Doc. 002218.]

phase ended and "negotiations" began. (Until Paxport had established financeability to the satisfaction of the Government, the parties could only "consult;" they could not begin negotiations. See, e.g., testimony of Mr. Mel Cappe, *Committee Transcript*, Tuesday, August 22, Issue No. 14, 14:41, 44-45.)

The Government's Chief Negotiator, Mr. David Broadbent, sent Mr. Shortliffe what he described as a "warning note" on March 18, 1993, before Mr. Broadbent was to have dinner with Mr. Matthews:

"A minefield could open up at Bronfman Matthews meeting because:

"1. It seems there is no way you can take Paxport substance and merge it with Claridge financing. Changes would be needed either cutting back on scope of development or raising more funds than Claridge bid envisaged. Causing modifications to merge proposals obviously impacts on integrity of RFP system which may or may not give cause for concern." [Memorandum for Mr. Glen Shortliffe from Mr. David Broadbent, dated March 18, 1993, Committee Doc. 2179.]

This was followed up with a memorandum, again to Mr. Shortliffe, after the dinner meeting. Mr. Broadbent reported:

"Abundantly clear that an \$800m development cannot be financed by \$500m Claridge deal. So either one cuts back on development or ups cash from Claridge levels (or some combination) if one wants to reduce up-front hit on airlines.

"Regarding Mergeco situation, Jack was strongly positive on current "in-bed" nature. Fears of Claridge waiting in weeds were imaginary. **He said he could easily secure change to Mergeco deal so that if Goverment wanted to go with Claridge offer now, two parties would be cut in 50/50.** [Memorandum to Mr. Glen Shortliffe from Mr. David Broadbent, Committee Doc. 000912, emphasis in original document.]

Thus, it was "abundantly clear" to everyone that the original plan would not work; one could not take Paxport's proposal and simply add Claridge's "deep pockets," and proceed happily. Indeed, it is evident that Mr. Matthews was happy now to offer to go along "if the Government wanted to go with Claridge offer now," since now he was assured of being "cut in 50/50."

The suggestion is strong: the only reason Paxport's proposal was proceeded with was because it gave Paxport the leverage to ensure it would be "cut in 50/50" on the deal. In fact, the final deal was very much closer to Claridge's proposal than to that of

Paxport. The Government might just as well have proceeded with Claridge, except that in that case Paxport would have been cut out.

More Voices of Opposition

The developers also succeeded in silencing opposition voiced from within Transport Canada. The Assistant Deputy Minister, Airports, Mr. Victor Barbeau, was not named as Chief Negotiator for the deal by Huguette Labelle, the Deputy Minister of Transport, at least in part because the Hon. Jean Corbeil, Minister of Transport, told her that he "had had representations by different people indicating that they perceived Mr. Barbeau as slowing down the process." [*Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:9.] Dr. Labelle said the Minister indicated to her in discussions that "perceptions were out there" such that "it would probably not be in the best if we asked Mr. Barbeau." [*Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:41.]

Ultimately, the representations against Mr. Barbeau became so intense that he was sent home on "gardening leave," from May 27 until early July, 1993. When he returned, while he continued as Assistant Deputy Minister, Airports, he "was not ... involved in any way with the [Terminal 1 and 2 redevelopment] file as it progressed." [Testimony of Mr. Barbeau, *Committee Transcript*, Tuesday, July 11, 1995, Issue No. 2, 2:26.]

Dr. Labelle was very clear as to the source of the representations against Mr. Barbeau: they came from "the people who were negotiating with us on the other side of the table." [*Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:9.] These people were not shy about letting their views about Mr. Barbeau be known. Dr. Labelle testified that Mr. Glen Shortliffe "had indicated to me that ... he had had representations to the extent that Mr. Barbeau was impeding the process as well." [*Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:38.]

Dr. Labelle was emphatic in expressing her view "that Victor Barbeau is a highly professional public servant who was working extremely hard at that time.... I did not share that view [expressed by the Minister of Transport]." [*Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:9.] Full confidence in Mr. Barbeau's professionalism and diligence was also expressed by Dr. Labelle's successor as Deputy Minister of Transport, Mme. Jocelyne Bourgon. [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:65-66.]

None of the witnesses before the Committee in any way questioned Mr. Barbeau's motives in disagreeing with the pace and evolution of the negotiations over Terminals 1 and 2. But it was clear that because he was expressing concerns, he was viewed by the developers as an obstacle to a rapid and satisfactory resolution of the situation. Of greatest

concern is the fact that these views were heeded, and that one of the most senior officials, with extensive knowledge of the needs at Pearson Airport, was removed from the file (and for a time, from the Department) to allow the negotiations to speed to a conclusion.

Meanwhile, Treasury Board officials doggedly persisted in raising their concerns, notwithstanding that apparently they were falling upon deaf ears. On April 1, 1993, Mr. Gershberg sent a memorandum to Mr. Cappe, briefing him on what Mr. Gershberg described (again) as "an extremely messy file." The briefing was in preparation for a meeting "called by Mr. Shortliffe to review issues on the T1 and T2 file." [Memorandum from Mr. Sid Gershberg to Mr. Mel Cappe, dated April 1, 1993, Committee Doc. 00298.] Mr. Gershberg concluded his lengthy memorandum:

"The Minister of Transport has put the Department in a box in pursuing his 'preferred bidder' approach. Justice should be the one providing guidance to keep the Department out of a legal suit." [Memorandum from Mr. Sid Gershberg to Mr. Mel Cappe, dated April 1, 1993, Committee Doc. 00298, emphasis added.]

Treasury Board memoranda from this period note what they term the Government's "primordial" preoccupation with the selection process, pointing out that from Treasury Board's perspective, "the protection of the integrity of the bidding process" was crucial. It is also plain from the memo that the Treasury Board officials were concerned that this preoccupation was not allowing them to address the real issues that had to be considered in the deal. The memo notes that this overwhelming concern with the bidding process had supplanted their usual priorities, personnel issues in particular. [Interoffice Memorandum from Mr. Mel Cappe to seven Treasury Board officials, dated April 5, 1993, Committee Doc. 001103.]

Privy Council Office Involvement

The shadow of the Privy Council Office ("PCO") lies across many of the Government documents on the Pearson project in this time period. There were numerous memoranda of meetings called by Mr. Glen Shortliffe "to check on the status of the negotiations/ discussions on the redevelopment project for T1/T2." Mr. Broadbent testified that he and Dr. Labelle, Deputy Minister of Transport, went "almost weekly, to meetings in Glen Shortliffe's boardroom." [Committee Transcript, Wednesday, August 2, 1995, Issue No. 9, 9:89.]

Treasury Board officials complained several times that Mr. Broadbent was dealing directly with Privy Council officials, rather than going through the usual channels. As a result, they noted repeatedly that it was "very difficult for [Treasury Board] to stay on top of this file." [See: Memorandum from Ms. Carole Swan to Mr. Sid Gershberg, dated April

29, 1993, Committee Doc. 00269; see also, Memorandum from Ms. Carole Swan to Mr. Sid Gershberg, dated May 10, 1993, Committee Doc. 00272.]

Ultimately, when Mr. Broadbent's term as Chief Negotiator ended, he was replaced with an official brought in from the Privy Council Office, Mr. Bill Rowat.³³

Mr. Shortliffe did not believe that he spent a "disproportionate" amount of time on the Pearson file. He justified the many meetings and close supervision with the statement that the deal "was one of the priorities that the government of Prime Minister Mulroney had identified that it wanted to have completed before it left office." [*Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:78.] And in particular, part of the close involvement of PCO was attributed to the intense pressure being brought to bear to conclude the deal by May 31/June 1, 1993. (This does not fully explain, however, why PCO dispatched Mr. Rowat to conclude the deal, since his term as Chief Negotiator did not begin until after the June 1 target date had passed with no agreement reached.)

Mr. Shortliffe testified that the May 31/June 1 deadline was driven by the desire of Prime Minister Mulroney to have the deal completed before he relinquished his office to his successor. [*Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:74.] Mr. Broadbent told the Committee that he was fully aware of the Prime Minister's active concern with the progress of the file. Mr. Broadbent testified: "Mr. Shortliffe said that the Prime Minister had a live interest in this file and quite frequently asked how it was going." [*Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:103.]

³³ Mr. Broadbent was quite frank -- with the Committee and also at the time with Dr. Labelle and Mr. Shortliffe -- that he felt he had been working under unacceptable conditions, "not getting the support from the airports group that I should have been getting." [*Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:98-99.] Dr. Labelle's view was rather different: after noting that the Department met those demands presented by Mr. Broadbent whenever possible, but that some were "unreasonable" [8:42], she described the events around the non-renewal of his contract as follows:

"Mr. Broadbent was hired for a term contract which was to end in mid-June.... When it became evident to me that we were likely going to be slipping beyond mid-June, I spoke to Mr. Broadbent and asked whether he would consider an extension of his contract if invited to do so. At that time, he indicated to me that he had other plans for the summer and although [he] was non-committal, [he] was not enthusiastic about pursuing this option. So that as the days went by and I was informed that there would be a new associate deputy minister coming to Transport, someone who in PCO had been following the file -- he was the senior officer looking after I think the operation side of government. Certainly our department was one that we were working through him in PCO. So he was someone who knew the file well and at that time so that in the last days Mr. Broadbent was not invited to renew his contract by myself, with the concurrence of the minister." [*Committee Transcript*, Tuesday, August 1, 1995, Issue No. 8, 8:44.]

An internal Paxport memorandum dated April 15, 1993, a copy of which was sent by Mr. Jack Matthews to Mr. Broadbent, reported "some interesting comments" made by Mr. Wayne Power, a Transport Canada official, in a meeting with a Paxport official:

"Wayne did make some interesting comments. He complained about the pace of the negotiations and about the **political interference** in the process. **He bemoaned that the government, having made a decision about the future of the terminals, didn't sit back and allow the public servants to get on with the process in an orderly fashion 'just like Terminal 3'.**" [Memorandum entitled "Coordination with Transport Canada at LBPIA," from Mr. Dale Nankivell to Mr. Jack Matthews, dated April 15, 1993, Committee Doc. 001104, emphasis added.]

The Treasury Board officials who appeared before the Committee attested to the political pressure that was applied to complete the deal by May 31, 1993. In response to questions posed by Senator David Tkachuk, Mr. Cappe testified that there was "strong pressure," and that it "was a reflection of the number of meetings that were being called. Mr. Broadbent coming back from his negotiations indicating that he wanted to see progress quickly because he needed to deliver May 31.... [T]here was a common understanding among senior public servants that there was an urgency to the file to get the deal done by May 31st." [*Committee Transcript*, Tuesday, August 22, 1995, Issue No. 14, 14:94.]

The Committee learned that this pressure was coming directly from the Prime Minister.

On April 29, 1993, Ms. Carole Swan, then Director of the Transport and Environment Division of Treasury Board, noted that, "Mr. Shortliffe may indicate the need to meet regularly to keep things on track for June 1." [See, eg., Memorandum from Ms. Carole Swan to Mr. Sid Gershberg, dated April 29, 1993, Committee Doc. 00269.]

By May 6, 1993, the pressure had increased. "Shortliffe wants to meet weekly... to keep every one on track on both T1 and 2 as well as the runways." [Interoffice Memorandum from Mr. Paul Gonu to Mr. Al Clayton, dated May 6, 1993, Committee Doc. 000417.]

Mr. Broadbent agreed with Senator Michael Kirby that this level of involvement by the Privy Council Office, and by the Clerk of the Privy Council, was unprecedented:

Senator Kirby: [Y]ou just said that there were weekly meetings. I guess maybe having been around the job of secretary of the cabinet on and off for many years, I'm quite stunned that this issue was of such importance that the secretary of cabinet would take the time to spend weekly meetings at it. That gives it a level of importance that is truly unbelievable.... [I]t's just incredible.

Mr. Broadbent: ...[Y]es, I would agree with you. It did show the significant interest at senior levels of bureaucracy in the central agencies, and in part, senator, that, I put it to you, might well be because they knew that we were being asked to do an extreme amount of work in a very short time and didn't want things to go off the rails.

Senator Kirby: But would you not also agree on the basis of your other experience in the PCO that various parts of the public service often get asked to do things under very short time frames, but that central agency involvement -- because after all, this was a line department transaction.

Mr. Broadbent: Yes.

Senator Kirby: This was not a major policy issue in a policy sense. It was a transaction type issue. I have certainly never seen a case where the central agencies would have taken -- at least the PCO and the secretary of cabinet specifically -- this level of interest in it.

Mr. Broadbent: I can't think of a comparable situation either. [*Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:109.]

The documents highlight the difficulties officials faced by reason of the May 31/June 1 deadline. Back in November, 1992, Mr. Shortliffe had pointed out to the Prime Minister that "Transport's current estimate is ... it will take a minimum of 12 months to negotiate the lease." [Memorandum to the Prime Minister from Mr. Glen Shortliffe, dated November 16, 1992, Committee Doc. 002188.] As of late April, 1993, negotiations had not even begun; according to other memoranda to the Prime Minister from Mr. Shortliffe, "delays by Paxport and Claridge in clarifying the status of Mergeco ... were slowing progress on the file." [Memorandum for the Prime Minister from Mr. Glen Shortliffe, dated April 23, 1993, Committee Doc. 002210; see also, Memorandum for the Prime Minister from Mr. Glen Shortliffe, dated April 8, 1993, Committee Doc. 002097.]

Nevertheless, the documents show how great the pressure was to meet the June 1, 1993 deadline. Officials pointed out the risks in rushing such complex negotiations, noting that, "This timetable is extremely tight... we understand from Allan MacGillivray [an official in the Privy Council Office] that every effort will be made by David Broadbent to ensure that *nothing compromises the attainment of this objective*. As a result, very little time is left to address the human resources issues through an agreement with the operator." [Scenario Note, Interdepartmental Meeting on T1/T2 Human Resources Issues, dated April 27, 1993, Committee Doc. 002101, emphasis added.]

And from other officials:

"The deadline of June 1 still appears extremely optimistic. Negotiations are to be completed with sensitive personnel and financial issues still to be worked out. Locking in a complex deal under a long term lease agreement in such a short period may not be very prudent." [Memorandum from Ms. Carole Swan to Mr. Sid Gershberg, dated April 29, 1993, Committee Doc. 00269.]

Only on May 5, 1993 did negotiations officially begin,³⁴ and yet the "strong pressure" to meet the patently unrealistic May 31 deadline continued:

"Mr. Shortliffe has called this meeting to check on the status of the negotiations on the redevelopment project for T1 and T2. There remains strong pressure to meet the deadline of May 31, 1993, to arrive at an agreement. The Minister of Transport announced on Wednesday, May 5, 1993 that 'Formal negotiations based on the proposal submitted by Paxport are currently under way'." [Memorandum from Ms. Carole Swan to Mr. Sid Gershberg, dated May 10, 1993, Committee Doc. 00272.]

While a Prime Minister's desire to accomplish particular goals before leaving office is unremarkable, exerting pressure to conclude a deal of this magnitude in a matter of only three weeks demands scrutiny. The agreements would have transferred control of Canada's largest airport -- its "gateway" to domestic and international markets -- for 57 years. The Committee was told this was a vastly more complicated transaction than that for Terminal 3, since this involved a transfer of existing buildings, existing leases with retail tenants, existing leases with airlines, and existing arrangements with employees. [Testimony of Mr. Wayne Power, *Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:11-12.] **Yet, while the simpler Terminal 3 contracts took ten months to complete, the Terminals 1 and 2 leases were to be negotiated and concluded in three weeks.** Why? The only answer the Committee received was that the Prime Minister wanted it done before he left office.

³⁴ The testimony from all Government officials was clear that while the issue of financeability was unresolved, the parties could only "consult," they could not "negotiate." [See, eg., testimony of the Hon. Jean Corbeil, *Committee Transcript*, Wednesday, September 20, 1995, Issue No. 21, 21:27.] However, it would seem from a review of the Government memoranda from March through April, 1993, that Mr. Broadbent in fact was negotiating with Mergeco. For example, a memorandum prepared by Mr. Broadbent of a meeting he held with Mr. Jack Matthews and Mr. Peter Coughlin on March 23, 1993, headed "Focus on Air Canada Aspect," Committee Doc. 001555, describes essentially a negotiation session, complete with proposals and counterproposals of rents, deferrals of rents, and future negotiation workplans. Again, this raises questions about the process: clearly the Chief Negotiator was so concerned about meeting the May 31/June 1 deadline, that he was prepared to begin negotiations even before he was authorized to do so by the Government.

The Changing of the Guard

Ultimately the May 31/June 1 deadline was not met. As it became evident that the Government would change (from one headed by the Rt. Hon Brian Mulroney to one headed by the Rt. Hon Kim Campbell), several interesting events occurred.

First, a curious agreement was prepared quickly and executed on June 18, 1993, between the Government of Canada and Pearson Development Corporation. The agreement contains no final terms relating to the development project because, as was evident from the documents and the testimony of the successive negotiating teams, the many serious issues dividing the parties were still open and unresolved. Indeed, the agreement states that it "does not constitute a legally binding agreement between the parties." [Letter-Agreement between Her Majesty the Queen in Right of Canada and Pearson Development Corporation, dated June 18, 1993, Committee Doc. 000832.] The entire purpose was to bind the parties -- in particular, the new Government -- to continue the negotiations.

Mr. Rowat explained to the Committee that since "there was going to be clearly a change in the leadership and a new leader appointed and a new cabinet appointed.... there was a great deal of ... uncertainty...." The purpose of the document was to "record where we were in terms of the negotiations at a point in time and what the intentions were of the groups on both sides as to what the next steps would be from thereon in." [Committee Transcript, Thursday, August 3, 1995, Issue No. 10, 10:64-65.]

However, notwithstanding that this agreement failed to move the negotiations forward substantively, it succeeded in solidifying the understanding of all parties that a deal would go through. As such, it constituted one of the "milestones" referred to in these hearings by the negotiators -- a milestone that marked the Government's deepening commitment to a deal with these developers, and conversely, the possibly deepening exposure by the Government to restitution payments should it decide that the terms were unacceptable, or for whatever reason, that it did not wish to proceed. [Testimony of Mr. William Rowat, Committee Transcript, Monday, October 23, 1995, 1110-3.]

Around this time, another change was made that affected the file: Dr. Huguette Labelle, who had been Deputy Minister of Transport, was replaced by Mme. Jocelyne Bourgon. Dr. Labelle was clear with the Committee that she did not ask for a transfer from the Transport portfolio. While she would not say so, it is known that the transfer from Deputy Minister of Transport to President of the Canadian International Development Agency is a demotion in civil service terms, from the highest Deputy Minister ranking to a lower one. [Committee Transcript, Tuesday, August 1, 1995, Issue No. 8, 8:33.]

The circumstances of this shuffle of deputy ministers is interesting. Mr. Bill Neville, who it will be recalled was part of Paxport's lobbying team, also acquired other responsibilities in June 1993: he became the head of the transition team as the Rt. Hon. Kim Campbell became the Prime Minister. As Mr. Neville explained his duties:

Mr. Neville: In general terms, the agenda involved the actual transition arrangements between the changing of the guard, if you will, the restructuring and reorganization of the cabinet and the government that accompanied this particular transition. The appointment of ministers, the staffing of our office and a kind of immediate agenda of activity for Ms. Campbell. Those were the major items.

...

Senator Stewart: Did you discuss the disposition of deputy ministers, any deputy ministers who had proven unsatisfactory and who should be supplanted?

Mr. Neville: As part of the transition process flowing essentially out of the reorganization of the ministries that was involved there, there was also a reorganization of deputy ministers and that happened during this period.

Senator Stewart: Could you give us any specifics, let's say with regard to Transport?

Mr. Neville: It was during this reorganization that Mrs. Labelle was moved to CIDA as I recall. Jocelyne Bourgon was appointed the Deputy Minister of Transport. [*Committee Transcript*, Thursday, August 24, 1995, Issue No. 16, 16:21.]

Throughout the time that Mr. Neville was advising Ms. Campbell on ministers, staffing and the deputy minister shuffle, he continued to invoice Paxport for lobbying activities on Paxport's behalf. [See: Invoices signed by William H. Neville, made out to Paxport Management Inc., dated May 3, 1993 ("for services for the month of May, 1993"); June 3, 1993 ("for services for the month of June, 1993"); July 2, 1993 ("for services for the month of July, 1993"); and August 3, 1993 ("for services for the month of August, 1993"), Committee Doc. 002290.]³⁵

Clearly there was a "revolving door" of personnel on this file, with deputy ministers, assistant deputy ministers and chief negotiators being moved in and out of the file at a rapid

³⁵ Mr. Ray Hession, former President of Paxport, testified repeatedly that Mr. Neville had been "off the payroll" for "several months" by the time he worked on Ms. Campbell's transition team. [See: *Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:10, also 9:14.] However it is evident from the invoices supplied by Mr. Neville that he continued to bill Paxport for lobbying services right through the relevant time that he was working (on a volunteer basis) for Ms. Campbell. [See: testimony of Mr. Neville, *Committee Transcript*, Thursday, August 24, 1995, Issue No. 16, 16:20.]

pace. Noting this, Senator John Bryden asked the Hon. Jean Corbeil the logical question: "Did you keep changing personnel until you got somebody that would make this deal happen?" [*Committee Transcript*, Wednesday, September 20, 1995, Issue No. 21, 21:73-74.] Mr. Corbeil refused to answer the question, choosing instead to attack the question as "insidious."

When Mme. Bourgon became Deputy Minister she, together with the Minister of Transport, decided that she should focus on the overall needs of the Department, rather than trying to get up to speed on the complex negotiations. [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:53.] As a consequence, Mr. Rowat retained control of the file.

The only constant, then, throughout the evolution of this deal from inception until signing in October 1993, was Mr. Glen Shortliffe, who first was involved as Deputy Minister of Transport and then continued active, close supervision from his positions at the Privy Council Office. Ultimately, of course, it was his assistant, Mr. Rowat, who stepped in to resolve the outstanding issues in the negotiations, and to get the deal done.

V. NEGOTIATING THE AGREEMENTS

On May 5, 1993, negotiations officially began between the government and Mergeco (by this point, renamed Pearson Development Corporation, hereinafter "PDC"). As was seen earlier, it was critically important to the Government that negotiations proceed, and be seen to proceed, on the basis of the Paxport proposal, and not either the Claridge or a "third" (or PDC) proposal. The Government recognized that otherwise the integrity of the RFP process would be seen to have been compromised.

Comparing the terms of the final deal with those of each of the original Paxport and Claridge proposals, it is plain that the final deal was much closer to the Claridge proposal than that of Paxport. This is evident from a comparison of the key numbers:

Return to the Crown: This was probably the most important element in the selection of the Paxport proposal as the "best overall acceptable proposal." The original return to the Crown promised by Paxport was \$1,246 million. The return to the Crown promised by Claridge in its proposal was \$642 million. The return to the Crown under the terms of the final deal was \$843 million -- far closer to that set out in Claridge's proposal than what was promised in Paxport's proposal.

Construction Expenditures: Paxport promised to spend \$858 million in staged redevelopment of the terminals; Claridge promised to spend \$606.2 million in staged

redevelopment of the terminals; and the final deal required \$682 million in staged development. (As will be set out in detail below, only \$350 million was actually *required*; the balance of the construction expenditures would be necessary only if certain passenger volume levels were met.) \$682 million is much closer to \$606.2 million than it is to \$858 million.

Development Plan Financing: Paxport's original proposal required \$858 million, to be financed through a combination of \$106.5 million equity, \$618 million in debt, and \$33.5 million from cash flow from operations. The Claridge proposal required \$758.2 million, to be financed with \$227.5 million in equity and \$530.7 million in debt. The final deal required \$742 million, to be financed through \$258 million in equity and \$484 million in debt. The similarities between the final deal and the Claridge proposal are striking.

Airline Costs, Per Passenger: Paxport's proposal would have seen airline costs for each passenger rise to \$4.93 in the first year, with this cost jumping to \$11.79 in Year 10. Claridge's proposal would have restricted airline costs for each passenger to \$2.49 in Year 1, going up to \$8.79 in Year 10. Under the final deal, airline costs per passenger would have been \$2.38 in Year 1, rising to \$8.15 in Year 10.

Public Servants' Concerns

The contrast between the original Paxport proposal and what was being proposed for negotiation concerned public servants virtually as soon as negotiations began. In a memorandum dated May 10, 1993 to Mr. Sid Gershberg, Ms. Carole Swan of the Treasury Board noted:

"The most significant issue may be the degree of difference between what is being proposed now for the redevelopment of T1 and T2 and the original Paxport proposal (over \$600 million)." [Memorandum dated May 10, 1993 from Ms. Carole Swan to Mr. Sid Gershberg, Committee Doc. 00272.]

The memorandum went on to discuss the proposed investment to redevelop the two terminals: an immediate investment of either \$47 million or \$96 million. It continued:

"Further development beyond the \$47M or \$96M investment in line with the original \$600 million Paxport proposal would depend on passenger volumes reaching levels that make the project viable and:

- the airlines agreeing to leases that would allow recovery of their share of the costs; or

-
- the cash being raised by a Passenger Facility Charge (PFC)." *[Ibid.]*

After noting the agreement negotiated with respect to a passenger facility charge -- "that no PFC would be considered before January 1996 and the Crown (or its assignee -- possibly an LAA) would have to approve the proposal and its details" -- Ms. Swan warned:

"Therefore, there is a risk that if these conditions are not met, the terminals could be turned over under a 57 year lease (40 year term with a 17 year option) for no other investment commitment than \$47M or \$96M." *[Ibid., emphasis added.]*

Indeed, those were the final terms of the lease signed by the parties. The Ontario Government conducted a review of the final agreements for its submission to Mr. Robert Nixon. It noted:

"The tenant gets 57 years regardless of whether all the development stages are taken out. This is unusual. Typically, if a Tenant does not develop, it can lose the lease. The only opportunity for a Landlord buy-out is after exercise of option for the last 20 years." *[Appendix A to Provincial Submission to Robert Nixon, dated November 17, 1993, Committee Doc. 002318, page 212-720, emphasis added, underscoring in original document.]*

Returning to May, 1993: There were more internal memoranda, expressing ever more urgent concern among the public servants about the deal being negotiated. On May 17, 1993, Mr. Robert Fonberg of the Department of Finance wrote to his Assistant Deputy Minister, Mr. Michael E. Francino, to update him on the negotiations and outstanding issues. This memorandum began:

"Transport officials have been working at a furious pace to meet the goal of signing final agreements by the end of May. **Within weeks, the government will be bound by the terms of a 57 year lease."** *[Memorandum dated May 17, 1993 from Mr. Fonberg to Mr. Francino, Committee Doc. 002072, emphasis in original document.]*

Mr. Fonberg expressed great concern over the potential that the developer, in control of all three terminals, would be in a position to charge monopolistic fees:

"As mentioned in previous notes, once final agreements are signed with PDC, the developer will oversee all three terminals at Pearson. **We are concerned that PDC will soon be in a position to charge "monopolistic" fees. Transport officials are considering ways of controlling future prices but have not yet developed acceptable solutions. **Safeguards need to be built into the ground lease so the airlines cannot be hit with charges beyond those contemplated in the original proposal.****

"Regarding airline charges, we should note that the Paxport proposal forecasts a more than tripling of fees over the next 10 years, from \$2.38 to \$8.72 per passenger. The government may be open to some criticism for condoning, and perhaps encouraging, these higher rates: PDC will be setting prices to recover capital expenditures, O&M costs, ground rents and profits; in the early years of the project, ground rents of almost \$30M account for a third of the airline charges; by the tenth year, these rents approach \$100M. **Clearly, if this deal stands, a communications plan should be developed which defends the higher prices and ground rents.** Government cannot "pass the buck" to the developer." *[Ibid.*, emphasis in original document.]

No significant safeguards were built into the lease, however; and the cost of the development, including both the high return to the Crown and the substantial profits to the developers, would have been passed right through to the travelling public.

Mr. Fonberg discussed the Finance Department's review of "the economics of this project to determine if the risk/return trade-off faced by investors is reasonable." Working with PDC's forecasts of an after-tax internal rate of return of 19%, Mr. Fonberg warned:

"'Risky' projects might require a rate this high to attract investors; however, our initial impression of the T1/T2 project is that the developer bears little risk:

- development only proceeds once traffic volumes surpass pre-defined trigger levels,
- airline acceptance of higher prices or the introduction of PFCs are also pre-conditions to further development work,
- leases between PDC and the airlines will likely be structured so the airlines continue to pay the same fees irrespective of traffic levels,
- the formula for setting airline charges enables PDC to flow through three quarters of any construction cost overruns to the users, and
- Transport may be considering a 'guarantee' on traffic whereby a commitment would be made to not divert traffic from Pearson if volumes could fall below 30 million passengers.

...
"In summary, our preliminary view is that a 19 per cent IRR for the T1/T2 project may be excessive, considering the minimal level of risk." *[Ibid.,* emphasis in original document.]

On these points, the deal signed in October 1993 did not remove the risks against which Mr. Fonberg had warned. Indeed, Transport ended up agreeing to the guarantee not

to divert traffic from Pearson, thereby bestowing a monopoly of access to the skies over southern Ontario upon the developers.

The Finance memorandum ends pessimistically:

"Unfortunately, given the government's desire to sign a deal within two weeks, it is unlikely that Transport would be successful in negotiating a lower rate from the developer. No doubt, PDC feels it has an upper hand in negotiations."

[Ibid, emphasis in original document.]

Concessions Won by the Developers

Indeed, PDC managed to strengthen significantly its upper hand in the negotiations by means of the so-called "Air Canada Sandwich." As will be seen, PDC managed to persuade the Government that a serious wrong had been committed by its officials in the RFP process, which could give rise to legal claims.

A Treasury Board memorandum of May 19, 1993 also noted that "the Mergeco deal is already heavily in favour of the developer (i.e. low risk, high rates of return) and further concessions are unwarranted." [Memorandum dated May 19, 1993 from Mr. Sid Gershberg to Mr. Mel Cappe, Committee Doc. 001107.] The memorandum notes:

"[S]triking a deal on the guarantee of future lease payments to be made by airlines or a promise by the government to agree to a PFC may put the next government in a very difficult position.

"Overall, it is not clear to us whether Transport has developed a 'bottom line.'" *[Ibid., emphasis in original document.]*

If there was a bottom line, it certainly was not in place in late May 1993. In a memorandum dated May 25, 1993, Mr. Rowat explained to Mr. Shortliffe a proposal by Pearson Development Corporation to defer \$11 million in annual rents. Mr. Rowat reported:

"Mergeco is proposing to spend \$96 million in the first two years but only on the condition that Transport Canada reduce its rent by \$11 million per year until new agreements with the airlines can be reached, maybe not until 1997. We have recommended against this rent reduction because:

- it could reinforce the preconception in the minds of the project's critics that **the agreement was not reached on wholly commercial terms;**
- the rates of return on the project are already adequate (18.2%);

-
- it would give the appearance of the government subsidizing the project, when the underlying principle is private sector development;
 - **there is no source of funds for the up to \$44 million cost,**
 - it might appear to be a subsidy to the airline industry." [Memorandum to Mr. Shortliffe from Mr. Rowat, dated May 25, 1993, Committee Doc. 002194, bold added, underscoring in original document.]

Mr. Rowat testified that the issue of the rent deferral came to a head in late May. He was very clear: "At that point, the issue was resolved by the government, and **it was the government's directions to officials that we should take the \$11 million deferral for three years.**" [*Committee Transcript*, Wednesday, August 16, 1995, Issue No. 12, 12:7, emphasis added.]

When he testified, Mr. David Broadbent, who had first negotiated this rent deferral, agreed that it could be seen as "a subsidy or ... a loan from the Crown" to the developers in order to get the project started. [*Committee Transcript*, Thursday, August 3, 1995, Issue No. 10, 10:27.]

This direction contradicted the Request for Proposals, which provided:

"Notwithstanding that the Government is expecting an appropriate financial return in consideration of its contribution, the Government will provide no form of financial commitment including, for example... no provision of additional financial guarantees and no investment of any capital in the Project. The Government will not assume any role which may be interpreted as a partnership or joint venture.

"Furthermore, the Government will make no guarantees regarding any assumptions with respect to Airport capacity, passenger volumes, airline assignments, commercial rents and charges, or any other variable factor or condition which may impact upon the Developer's calculations of revenues and costs." [Terminal Redevelopment Project Request for Proposals, March 1992, page 29, Committee Briefing Book, Tab "H".]

Viewed in context, the Government's ready agreement to this \$33-million deferral does "reinforce the preconception in the minds of the project's critics that the agreement was not reached on wholly commercial terms," as Mr. Shortliffe was warned that it might.

The Committee heard testimony about a number of provisions in the final deal that were directly counter to the Request for Proposals; risks normally borne by the developers (the rationale for their reaping large profits from the project) shifted onto the Government; insulated the developers from competitive market forces; and passed the costs of the

development, of the profits to the developers and of the return to the Crown on to the shoulders of the travelling public. These included:

The passenger diversion guarantee: In the RFP, the Government was explicit that it would not provide **any** guarantees with respect to airport capacity, passenger volumes or airline assignments.

Nevertheless, Paxport was given such a guarantee by the Government. The Government promised not only not to divert traffic away from Pearson, but that it would not allow any passenger terminal facility to be developed within 75 kilometres of Pearson, until the volume of passenger traffic at Pearson Airport -- including all three terminals -- reached 33 million people annually.³⁶

Transport officials were emphatic in their opposition to such a guarantee. Mr. Power pointed out:

"It is my view that the capacity figures being put forward by Paxport are grossly exaggerated and unachievable. Additional terminal facilities to serve the needs of the Toronto area will be needed before those capacity figures are achieved. A compensation package will be a serious contingent liability for the Crown and an impediment to the provision of services as and when needed."

"In summary, it is recommended that traffic guarantees, compensation, protection from competition or similar concepts be rejected. Paxport has expressed an interest in participating in a privatization initiative, expects to reap rewards which are equal to or greater than most private-sector initiatives, and should be prepared to do so under conditions which exist in the private sector." [Memorandum from Mr. Wayne Power to Mr. Chern Heed, dated May 11, 1993, Committee Doc. 002013, emphasis added.]

The same warning was sounded in another Transport Canada memorandum, this one from May 12, 1993:

"Diversion of traffic could result if one or several of the airlines occupying T1/T2/T3 decided to relocate to another facility or decided to split their operations shifting some traffic to a new facility. It could also occur if airlines not operating at T1/T2 or T3 set up in a new facility and attract passengers that were using T1/T2 or T3 airlines. This type of diversion, initiated by the airlines based on market forces (location, access, level of service, price) should be accepted by Mergeco

³⁶ As the Chairman, Senator Finlay MacDonald, pointed out during the hearings, this figure should more accurately be stated as 31.5 million, as the Government was allowed on a one-time-only basis to divert up to 1.5 million people. [Committee Transcript, Tuesday, August 22, 1995, Issue No. 14, 14:5.]

as a risk of doing business. If their 'product' is competitive then they should be able to maintain their market share." ["Traffic Diversion - Minimum Passenger Volume to 'Guarantee'?", dated May 12, 1993, Committee Doc. 002008, emphasis added.]

Mr. Heed -- Airport General Manager at Pearson -- forwarded Mr. Power's May 11 memorandum to Mr. Victor Barbeau, with the comment: "I am afraid [Mr. Broadbent] is sympathetic to giving Paxport some sort of comfort to protect them up to 39 million passengers. I see this as a guarantee or in other words a possible contingent liability...." [Memorandum from Mr. Chern Heed to Mr. Victor Barbeau, dated May 12, 1993, Committee Doc. 002013.]

There was an exception to the passenger diversion guarantee. The Government could proceed with the development of another airport to compete with Pearson, so long as it paid compensation to PDC or allowed it access to Area 4, a section at Pearson that has been targeted for future development, but which was expressly excluded from the Request for Proposals. Once again: PDC managed to gain a shield from all risk, persuading the Government itself to bear the risk (the compensation would be paid from the Government's ground rents under the agreement), and also to violate the terms of the Request for Proposals.

It is also clear that providing such a guarantee made it impossible for the Government to promote the use of the Mount Hope airport facility at Hamilton as an alternative access point to Southern Ontario -- an initiative launched in the very same August, 1989 Strategy for the Future of Aviation in Southern Ontario that had initiated the redevelopment of Terminals 1 and 2. [Minister's Press Release No. 98/89, August 18, 1989.]

Hamilton is as close to Toronto as Newark is to New York City; yet **in their eagerness to finalize the deal with PDC, the negotiators surrendered the Government's ability to develop the airport there as an alternative access point to southern Ontario**, even though that was part of the original Government plan, and even though to provide such a guarantee ran directly counter to the terms set out in the Request for Proposals.

Passenger triggers for construction: As noted earlier, the proposal anticipated a staged course of construction at the terminals. However, this changed over the course of negotiations to an agreement whereby the only firm obligation of the developers was to complete the "quickstart" construction -- \$96 million -- followed by \$254 million for stage 1B. No other construction would ever take place at the airport -- for 57 years -- unless and until certain passenger levels had been reached:

Senator Kirby: Am I correct then in saying that unless the passenger levels were very carefully negotiated, it would in fact be possible for the developers to have had

this 57-year lease and spent no money at all beyond their initial quick start option because the trigger points were not reached? Would that have been a possibility?

Mr. Broadbent: If either the negotiators for the Crown had been stupid and incompetent or passenger growth in Pearson had absolutely stagnated, yes.

Senator Kirby: Well I'm not interested in imputing levels of intelligence to various people. Am I correct in saying that if the passenger levels had relatively -- if we just didn't reach the trigger points, and am I correct in saying the developers would not have had to spend more money?

Mr. Broadbent: You're quite correct, and development wouldn't have taken place and the negotiation of the trigger point, senator, was of fundamental importance. [*Committee Transcript*, Thursday, August 3, 1995, Issue No. 10, 10:31.]

As is evident from the internal memoranda quoted at length above, these provisions gave rise to great concern among the officials, particularly in the Finance Department and the Treasury Board. This deal was trumpeted as a "\$700-million terminal development initiative -- the largest ever undertaken at the airport," when it was announced on August 30, 1993. [Transport Canada News Release Communiqué No. 187/93, dated August 30, 1993, Committee Doc. 002269.] However, it was very possible that much of the \$700 million would never be expended on the airport, which could just as possibly be left undeveloped for 57 years -- with the Government unable to develop other airports in the area, unless it paid PDC compensation. In other words, the Government assumed the risk of low passenger levels at the airport. PDC was assured of keeping the airport under its control for 57 years, with few hard obligations to invest in the needed construction, and of course no political responsibility to the community it was serving.

The dangers for both the Government and the travelling public were exacerbated by the provisions in the deal with respect to Terminal 1 renovations. The Government had agreed to pay one-third of the costs required to keep Terminal 1 open, if those costs exceeded \$15 million. However, those renovations would not have begun until certain passenger trigger levels were achieved; consequently, there was a very real risk that the Government's financial exposure in the continued upkeep of Terminal 1 could run into millions of dollars.

Furthermore, as explained by Mr. Stephen Goudge, a respected lawyer who served as legal counsel to Mr. Nixon in his review of the Pearson Airport deal:

"T1 could have been forced to close at some stage because of age, given that the passenger triggers were not met. That would have required the passenger traffic below the triggers to be split between T3 and whatever portion of T2 had been redeveloped. This might have forced the Crown to develop other facilities before a 33 million passenger threshold was achieved, thus reducing the Crown's rent for

the amount of passengers transferred as well as the capital cost of the new facility." [Committee Transcript, Thursday, September 28, 1995, Issue No. 27, 27:47.]

In fact, stage 2, which was targeted to begin in May 1997, had a passenger trigger level of 24.2 million. At that time, officials were projecting that the terminals would be accommodating "roughly 26 or 27 million passengers a year" by 1997-98. [Testimony of Mr. John Desmarais, *Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:68.]

However, the recession lasted longer at Pearson Airport than expected, and the levels remained flat. Today, at the end of 1995, passenger levels at Pearson Airport are only around 20.5 million. [Testimony of Mr. John Desmarais, *Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:72.]

Passenger facility charge: A passenger facility charge was accurately defined during the hearings by the Chairman, Senator Finlay MacDonald, as "a head tax levied on people as they pass through an airport terminal." [Committee Transcript, Tuesday, August 22, 1995, Issue No. 14, 14:6.]

Neither of the original proposals mentioned anything about a passenger facility charge; nevertheless, the final agreement authorized PDC to impose a passenger facility charge if Air Canada was unable to pay its rent due to insolvency. Air Canada's financial troubles were well known, and the rent it would have had to pay would have increased dramatically under the negotiated deal.

The Government was given a right of approval of the passenger facility charge. However if the Government did not give its approval, the agreement provided that the developers would be released from their obligation to proceed with construction -- without giving up any rights under the agreements.

Senator Michael Kirby summed up the consequences for the travelling public that resulted from the combination of the passenger facility charge and the passenger diversion guarantee:

"When you say that there was to be a passenger diversion guarantee so that, in effect, passengers couldn't leave Pearson and go elsewhere, while simultaneously ... the company ... is allowed to charge a passenger facility charge, have you not essentially absolutely left the travelling public in an impossible situation? On the one hand, they can't go anywhere else because the government won't allow diversion of traffic and, on the other hand, these people have effectively the right to tax -- I use that in quotes, it's not a formal tax -- but the right to charge people.

Where is the consideration for the consumer in all this?" [Committee Transcript, Thursday, August 3, 1995, Issue No. 10, 10:33, emphasis added.]

The Committee has yet to receive a satisfactory response.

Airline Rents/ Cost to Travelling Public: The disdain for the interests of the travelling public is nowhere more evident than in the provisions of the deal that impacted on the rents to be charged to the airlines. **It was known by the Government from the beginning that the Paxport proposal called for a steep increase in rents charged to the airlines at Terminals 1 and 2. And it was known by the Government from the beginning that these costs would have been passed directly to the passengers.**

Paxport's proposal required renegotiating the lease with Air Canada to double the rent Air Canada currently was paying, "immediately, with no construction." [Testimony of John Desmarais, Senior Advisor to the Assistant Deputy Minister, Airports Group, *Committee Transcript*, Tuesday, August 15, 1995, Issue No. 11, 11:107.] Mr. Desmarais testified:

"That cost would obviously have been passed on to passengers, so you were starting to build very serious costs quickly, without any pay-off to the airlines or anybody else. So there were very high costs to the airlines and to the travelling public, if we accepted the proposal at face value, although we did get a lot of rent." [Committee Transcript, Tuesday, August 15, 1995, Issue No. 11, 11:107.]

Air Canada understood very well that its costs, and the costs to its passengers, would skyrocket under the Paxport proposal. Its concerns were described in a memorandum from Mr. Rowat to the Minister of Transport, dated June 30, 1993. Mr. Rowat explained that Air Canada did "not share our optimism for growth in air traffic," and felt that "Mergeco was loading too much cost on the backs of the air carriers." He noted that, "They feel that their needs for additional terminal redevelopment are no longer urgent.... They do not want to see their cost competitiveness impacted by the degree envisioned by the Mergeco proposals." [T1T2 Redevelopment Project, Committee Doc. 00294.]

Air Canada argued that it was being asked to raise its charges to passengers exponentially, to a level that risked making it uncompetitive, all to pay for a development that it neither needed nor wanted, and to subsidize the high return to the Government promised by the developer. Nevertheless the Government forged ahead with the project -- and joined actively in the negotiations between Air Canada and the developers.

In the end, it was the Government that made the concessions necessary to bring Air Canada "in line" with the deal, thereby sacrificing the high return which had justified the selection of Paxport's proposal in the first place. Claridge's proposal, as the Evaluation Committee had noted, recognized the realities of the airline industry during the recession,

and would not have required immediate renegotiations of the leases. The question persists: why was the Government so determined to bring this deal to a conclusion?

The "Air Canada Sandwich"

Many of the concessions made by the Government during the negotiations were justified to the Committee by the "Air Canada Sandwich": rights held by Air Canada, set out in a 1989 "Guiding Principles" document, that was not disclosed to the developers until very late in the process. The President of Claridge Properties Ltd. told the Committee that the revelation of these claimed rights was "devastating." [*Committee Transcript*, Tuesday, September 12, 1995, Issue No. 17, 17:14.] Their impact on the negotiations was enormous. However, the evidence shows that this impact was certainly exaggerated, and possibly even manipulated by certain of the parties for their own ends.

The background to the "Air Canada Sandwich" can be briefly described. In the late 1980s, Terminal 2 was in need of renovations. In 1989, Air Canada "came forward with a partnership proposal in which [Air Canada] would invest \$65 million, three quarters of the cost of the total improvements to Terminal 2 domestic wing, the balance being paid by Transport Canada." [Testimony of Mr. Dominic Fiore, retired Senior Director, Corporate Real Estate, Air Canada, *Committee Transcript*, Wednesday, August 16, Issue No. 12, 12:75-76.]

At that point, Air Canada had eight years left on its lease. As Mr. Fiore put it:

"In exchange for absorbing the lion's share of the investments in the rented facility, Air Canada and Transport Canada agreed to terms and conditions for a long-term lease on Terminal 2. The terms and conditions are referred to as the guiding principles for the Air Canada lease negotiations which are dated July 26 and signed, I believe, on August 1989." [*Committee Transcript*, Wednesday, August 16, Issue No. 12, 12:76.]

These "guiding principles," signed by Mr. Glen Shortliffe, then the Deputy Minister of Transport, referred to a "20-year lease term with two renewal options of ten years each for existing airline operational premises." ["Guiding Principles for Air Canada Lease Negotiations, Terminal II," dated July 26, 1989, Committee Doc. 00253.] Thus, it envisaged a possible 40-year lease between Air Canada and Transport Canada.

The legal status of this document, and its relevance to the T1/T2 project, was extensively discussed before the Committee. It was not mentioned expressly in the Request for Proposals, which referred to Air Canada's \$65 million investment in Terminal 2, and stated only:

"Air Canada's capital investments were made with the expectation that it would have the ability to enjoy the benefits of those investments over a reasonable and normal amortization period. Air Canada currently has a lease for the space which it occupies in Terminal 2. The term of this lease and options to renew will terminate in 1997." [Request for Proposals, page 27.]

Dr. Huguette Labelle, Deputy Minister of Transport when the RFP issued in March, 1992, testified that the view of Transport Canada was that the only official legal document in effect between Air Canada and the Government was the lease that would terminate in 1997:

"I think Transport Canada always took the position that the lease that they had with Air Canada was the official legal document that would be, you know, guiding any relationship with Air Canada in the future. And when it expired, then, of course, you negotiated another deal -- another agreement but that, at that time, the guidelines would serve as guidance to the negotiation of the next agreement with Air Canada." [Committee Transcript, Tuesday, August 1, 1995, Issue No. 8, 8:50.]

The Guiding Principles were not placed in the data room to which proponents had access as they prepared their proposals.

Mr. Broadbent first learned of the existence of this document when he had been "on the job a week or two," and in his words, he found it "alarming." [Committee Transcript, Wednesday, August 2, 1995, Issue No. 9, 9:96.] He expressed great surprise that it had not been included in the data room, and he barely stopped short of suggesting it was a deliberate attempt by officials to sabotage the privatization project:

"How could an RFP go out in a department run by competent people when they know there's a document that promises to lease the thing that you're going out with an RFP to lease this to others?" [Committee Transcript, Wednesday, August 2, 1995, Issue No. 9, 9:96-97.]

In fact, as the Committee learned, Transport officials were well aware of the Guiding Principles during the drafting of the RFP. A decision was taken that they did not belong in the data room, and that their substance should not be reflected in the RFP, because, according to Mr. Desmarais, it "was not a binding agreement. Only binding agreements went into the document room." [Committee Transcript, Tuesday, August 15, 1995, Issue No. 11, 11:32-33.]

This decision was made easier by the fact that when Air Canada was consulted during the preparation of the RFP, it did not raise the 1989 guiding principles document. In its submission to Transport officials at the time, it asked "that its non-cancellable lease, which

effectively extends through to April 30, 1997, be fully recognized and Air Canada's rights thereunder, including rental rate reviews based on current cost-recovery policies, be protected and maintained." [Letter from Mr. G.P. Mende, Manager, Airports Development, Air Canada, to Mr. Wayne Power, dated December 6, 1991, Committee Doc. 000483, page 520229.]

It also wanted a 30-year lease, plus two 15-year renewal options, as well as "full compensation for the unamortized cost of the \$66.9 Million investment in the current renovation at Terminal II." [Letter from Mr. G.P. Mende, Manager, Airports Development, Air Canada, to Mr. Wayne Power, dated December 6, 1991, Committee Doc. 000483, page 520230.]

Evidently, then, at the time when the RFP was prepared, Air Canada was not taking the position that the 1989 Guiding Principles was binding or in effect.

The relevant provisions of the RFP were sent to Air Canada for its review and comments before the issuance of the RFP. No comments were received from Air Canada challenging that document or the statement that the lease and options to renew would terminate in 1997. [Fax dated January 3, 1992 from Mr. Wayne Power to Mr. Julien DeSchutter of Air Canada, Committee Doc. 000483, page 520233.]

Moreover, Paxport and Air Canada had enjoyed a very close working relationship throughout the period when the 1989 Guiding Principles were prepared, and this continued at least into July, 1991.³⁷ Beginning in June 1989, and continuing well into 1991, Mr. Hession held regular meetings with Air Canada officials to ensure that the airline was entirely familiar and happy with Paxport's plans for the airport, thus to position Paxport as a credible candidate in the eyes of Transport Canada.

As late as July 1991, Mr. Hession was reporting on meetings with Air Canada officials in which, "It became clear early in the meeting that we are held in high regard by Air Canada. They both made it clear that, if there is to be a private developer for T1/T2, they continue to want us. They also said that they do not now nor intend in the future to have discussions or dealings with any other developer." [Memorandum from Mr. Hession to Mr. Don Matthews and Mr. Jack Matthews, dated July 12, 1991.]

³⁷ It is evident from an internal Paxport memorandum that Mr. Hession was in close contact with Air Canada officials as the latter were preparing to submit their statement of requirements to Transport Canada for inclusion in the Request for Proposals. See: Memorandum from Mr. Ray Hession to Mr. Don Matthews and Mr. Jack Matthews, dated March 6, 1991, reporting on a telephone conversation that morning with Mr. Doug Port of Air Canada.

Indeed, Paxport and Air Canada had joined together in June, 1990, to submit an unsolicited proposal for the redevelopment of Terminal 2 to Transport Canada. Correspondence received from Mr. Hession documents discussions between Paxport and Air Canada regarding "the business plan that Air Canada and PAXPORT will rely upon as the basis for their business deal (lease, etc.) to be negotiated following a government decision." [Memorandum entitled "Air Canada/Paxport Proposal," from Mr. Ray Hession to Mr. Don Matthews, Mr. Jack Matthews and Mr. Peter Goring, dated May 29, 1990, Committee Doc. Ref: 5700-1.35/P1-13, 1-#0268.]

It strains credulity that Paxport would not have asked Air Canada about the terms of its existing lease. It is also difficult to believe that Air Canada did not mention the 1989 Guiding Principles, when they were prepared and signed at the very time Air Canada was engaging in discussions with Paxport.

Under questioning from Senator Céline Hervieux-Payette, Air Canada officials testified that their discussions with Paxport always were based on the 1989 Guiding Principles.

Senator Hervieux-Payette: And was this business plan or this financial arrangement with Paxport, in the unsolicited proposal, did you take into account the guiding principle...?

Mr. Fiore: ... I do remember saying that we did have an agreement for our phase 1, that we would enter into a long-term lease. And it defined all the terms and conditions for the long-term lease once the 1997 lease expired.

...

We were consistent throughout. Whether it was with Transport Canada, whether it was with Paxport or whether it was with PDC, we always were consistent in our principles, the long-term lease, the whole thing. [*Committee Transcript*, Wednesday, August 16, 1995, Issue No. 12, 12:86-87.]

Mr. Gordon Baker, the lawyer for the Matthews Group, denied that Paxport had any knowledge of the guiding principles. [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:9-10.] In a paper submitted to the Committee, he claimed that the guiding principles were "undisclosed to the proponents... [until] a letter to Jack Matthews, President of Paxport Inc. and Peter Coughlin, President of T3LP Co. Investments Inc. on June 16, 1993," and that this constituted "a gross misrepresentation" to the proponents. ["Analysis of Robert Nixon's Pearson Airport Review," by Gordon R. Baker, dated May 31, 1994.]

The documentary evidence does not support Mr. Baker's claims. A memorandum of a meeting on March 3, 1993, of the Deputy Minister of Transport, Mr. Richard LeLay (Chief of Staff to the Hon. Jean Corbeil, Minister of Transport), Mr. Keith Jolliffe and Mr. Robert

Green of Transport Canada, and Paxport representatives, including Mr. Jack Matthews, shows that as of that date Mr. Matthews was well aware of Air Canada's position that it held a 60-year lease. The memorandum reports:

"Matthews stated that Air Canada's view is that they have a lease for 60 years and not just until 1997." ["Telcon Between Driedger/Heed/Desmarais and Barbeau/Jolliffe, March 4, 1993, Committee Doc. 00189.]

In any event, the *effect* of the dispute was clear. Air Canada used its leverage of the possible 40/60-year lease to defer the substantial rent increases required by the Paxport (now PDC) proposal. Meanwhile, the fear that Transport Canada officials had somehow been remiss in their obligation with respect to the RFP process gave Paxport and Claridge considerable leverage in their negotiations with the Government.

Mr. Broadbent testified that without the problem of the undisclosed 40-year lease document he was "firmly convinced that we could have concluded this deal on slightly better terms to the Crown." [Committee Transcript, Wednesday, August 2, 1995, Issue No. 9, 9:100.] There was indeed an "Air Canada Sandwich," but it was the Canadian Government -- and in particular the Canadian people -- who ultimately were squeezed in the middle.

Concessions Won by Air Canada -- And Lost by the Other Air Carriers

In the final deal, all of the \$350 million Stage 1A and B construction was to go to Terminal 2 redevelopment. Air Canada agreed to pay higher rents after its existing lease terminated in May, 1997, in exchange for agreement from the Government to reduce its ground rent by 15%, which would then be passed on to the airlines by the developer. [See: Letter from Mr. Bill Rowat to Mr. Dominic Fiore dated September 21, 1993, Committee Doc. 000887; and see testimony of Mr. R.A. Morrison, Vice-President, Corporate Communications, Government and Industry Relations, Air Canada, *Minutes of Proceedings and Evidence of the Standing Committee on Transport*, Tuesday, May 31, 1994, Issue No. 8, 8:9; and see testimony of Mr. Rowat, Committee Transcript, Wednesday August 16, 1995, Issue No. 12, 12:9.]

Thus, in effect, the Government agreed to subsidize Air Canada and the other airlines by reducing the return to the Crown, in order to persuade the airlines to sign leases and to allow the deal with PDC to proceed. Again, this was contrary to the RFP, which had stipulated that the Government would not provide any subsidies.

The Canadian public was placed in the situation where they would bear the cost of this redevelopment project. The developers were clear that they were passing their costs on to the airlines, which would pass them on to their passengers. Canadians were supposed to

benefit because the Government would receive a high return from the project. However, this return was reduced, not once but twice -- the \$33 million rent deferral to subsidize the \$96 million quickstart program, and the 15% rent reduction to subsidize the airlines' rent to the developers.

Transport Canada went even further to bring Air Canada "on side" with the deal: it excluded the other air carriers from the negotiating process. On June 29, 1993, the Airline Operators Committee - Terminal 1 Sub-Committee wrote to Paxport, the Hon. Jean Corbeil, and to Mr. Chern Heed (the General Manager of Pearson Airport) protesting against their exclusion from the negotiation process, and against the anticipated rent increases:

"The carriers of Terminal One were disturbed to learn that Transport Canada had previously instructed Paxport to discuss their redevelopment plans only with Air Canada. Our exclusion was not justified.

"During the presentation, Mr. Trevor Carnahoff clearly stated that the staging is directly related to a projected increase in passenger traffic from 20 million in 1992 to 35 million by 1999. How did you arrive at a 75% increase over this seven year period? Are you not aware that there has been negative traffic growth in the past five years? This projection is unrealistic.

"Equally unrealistic is your plan to recover the cost of your \$750 million investment through increased retail sales, parking revenues and cost base leases. Terminal 3 was built using the same formula, which as all can see has thus far been a financial disaster. We cannot and will not put ourselves in a similar position.

"We would remind Paxport and the Government of Canada that the two major carriers (Air Canada and Canadian) lost, in the first 90 days of 1993, \$4.5 million per day for a combined first quarter loss of \$405 million. The U.S. carriers operating at Terminal 1 are facing the same financial difficulties.

"Is this the appropriate time to increase our operating costs at Pearson International Airport by 500%, which is a conservative estimate of what your \$750 million proposal will do?

"Who will remain in business to pay for your extravagant folly?" [Letter from Carole Pitre, Chairperson, A.O.C. - Terminal 1 Sub-Committee to Paxport Inc., dated June 29, 1993, Committee Doc. 001088, emphasis in original document.]

Continued Warnings from Public Servants of Problems with Deal

The many defects in this deal are clear with the benefit of hindsight. However, the documents show the numerous attempts made by Government officials to point out these defects at the time.

For example, on July 20, 1993, Mr. Ian Clark, Secretary of the Treasury Board, wrote a memorandum to the President of the Treasury Board in which he stated that the Treasury Board Secretariat "has several concerns over the Pearson Airport initiatives." He enumerated the following:

- the government will likely pay a heavy price for T1/T2 redevelopment, in terms of winning Air Canada support and/or granting concessions to Mergeco;
- Mergeco is trying to push any risk back on the government through guarantees on passenger volumes, deferred rent and the likely introduction of a PFC, since Mergeco believes the government wants a deal at almost any cost;
- the overall risks to Mergeco are low, yet the projected rates of return are high (14 to 16% over the 57 year lease term);
- the airport could become inefficient since operations would be segregated in three separate leases (T1/T2, runways and T3), overseen by two layers of bureaucracy (Transport and an LAA); and
- the role of an LAA would become quite limited, with the government facing criticism for denying Toronto interests an opportunity to manage this airport under the umbrella of an LAA, as done last year for four other major airports.

"TBS would prefer that Transport pursue negotiations with the Toronto LAA on a fast track basis and transfer the responsibility for T1 and T2 and runway projects to that entity. This would be consistent with the policy adopted for other major international airports. However, this may not be possible on T1 and T2 unless the proposed deal being negotiated with Mergeco collapses." ["Memorandum to the President" from Mr. I.D. Clark, Secretary, Treasury Board, dated July 20, 1993, Committee Doc. 002052.]

The Treasury Board was not alone in insisting upon the deal's serious defects. A month earlier, Mr. Keith Jolliffe, one of the key members of the negotiating team at Transport Canada, had written a memorandum he entitled, "Blue Sky Thinking: Terminal

Redevelopment Project -- LBPIA." Therein he listed each of the Government's objectives as set out in the RFP in seeking private sector interest in the redevelopment project. He then contrasted each of those objectives with the deal, noting in virtually every case how far the Government had abandoned its original purpose. The comparisons were appropriately entitled, "What's wrong with this picture?"

Among other things, Mr. Jolliffe noted that:

- Transport Canada's role as landlord would be considerably larger than anticipated, and not minimized as set out in the RFP;
- there would be no effective "synergies" linking the three terminals: Terminal 3 would be operated under a separate management structure, and by a separate entity, Lockheed Air Terminals; Terminals 1 and 2 would be operated by transferred former Transport Canada employees;
- with the rent deferral clause, the diversion clause and compensation, and other specified clauses, "the government [was] agreeing to underwrite private sector risk taking."

With respect to "an appropriate financial return for the Crown," Mr. Jolliffe noted that:

"Soft assurances or assumptions in the Paxport proposal have been replaced by the hard negotiations strategy of Claridge. This means that the deal is sliding down the financial slope of the Paxport return to the Crown towards ATDG proposed return to the Crown."

And that is exactly what happened. ["Blue Sky Thinking," dated June 24, 1993, Committee Doc. 002077.]

On September 14, 1993, Mr. Wayne Power wrote to Mr. Peter Coughlin expressing a number of concerns Transport Canada had with the deal. These concerns included issues of terminal capacity and the impact of the commitments made to Air Canada on other air carriers. For example, Mr. Power wrote:

"The Paxport Proposal emphasized the high capacity levels of the redeveloped terminals and it is apparent that public statements have created the perception of a major capacity increase. But, as you are aware, Transport Canada has expressed reservations as to the extent of the capacity increase in respect of the terminal complex generally and particularly in respect of gate/aircraft parking capacity. The redeveloped terminals will have essentially the same number of bridged aircraft

gates as currently exists; yet access and control of gates are important components of the Air Canada agreement and of T1T2LP's access and pricing policy." [Letter from Mr. Wayne Power to Mr. Peter Coughlin dated September 14, 1993, Committee Doc. 001672.]

A draft reply dated September 19, 1993 was received from the consortium, and circulated among Transport Canada officials for comments. Mr. Power passed the draft reply to the chief negotiator, Mr. Rowat, with the following cover note:

"Instead of providing some comfort that there is a well thought out plan available, their draft response indicates that they are still very much in the concept stage and don't have the answers we or the airlines are looking for. **There is no point in pressing for answers that don't exist at this time.**" [Fax cover sheet from Mr. Power to Mr. Rowat, dated September 22, 1993, Committee Doc. 000730, emphasis added.]

Mr. Desmarais added his comments to those of Mr. Power, including a suggestion that the consortium "should be reminded that providing a pleasant place to wait is not the objective of the exercise." [Memorandum from Mr. J.N. Desmarais to Mr. Power dated September 22, 1993, Committee Doc. 000730.]

Nevertheless, fifteen days later the deal closed.

Non-Arms Length Contracts: Skimming the Cream Off the Top

Both Paxport and Claridge defended the deal as fair to Canadian taxpayers, stating that "during the first 9 years of the term of the Lease ... the Partners of T1T2 Limited Partnership receive no cash whatsoever." [See: "Schedule A to the Statement of Claim by T1T2 Limited Partnership Upon Her Majesty The Queen in Right of Canada," para. 1, submitted to the Committee on September 8, 1995 by Mr. Hillel W. Rosen on behalf of T1T2 Limited Partnership; and testimony of Mr. Peter Coughlin, President, Claridge Properties Ltd., *Committee Transcript*, Tuesday, September 1, 1995, Issue No. 17, 17:16.]

This statement ignores the evidence of the numerous side deals by which the consortium members were to benefit from the Pearson Airport redevelopment. It is accurate that *technically* the contracts which surfaced during the Committee's investigations were not with the partners of T1T2 Limited Partnership. They were, however, with related corporate entities -- either parent companies of T1T2 partners, or sister companies, or other companies owned and controlled by the same persons who controlled a T1T2 partner (eg. Mr. Don Matthews and Mr. Jack Matthews).

These contracts would have allowed the consortium members to earn considerably more from Pearson than the 14% negotiated after-tax rate of return found by Deloitte & Touche³⁸. Mr. Stehelin of Deloitte & Touche was very clear in the report which found the 14% rate of return to be reasonable:

"Certain construction management fees to the Matthews Group during the development and other consulting fees for various services to other members of the group are not included in the IRR calculation of 14%. We are ascertaining the total of these amounts on a pre-tax basis and will comment on these under separate cover." [Report from Deloitte & Touche dated August 17, 1993, page 6.]

This further calculation was never done. [Testimony of Mr. Paul Stehelin, *Committee Transcript*, Thursday, August 17, 1995, Issue No. 13, 13:22.] However, Mr. Stehelin testified that under the regime proposed by the consortium, a number of expenses would be "buried in a number called 'management fee.'" [*Committee Transcript*, Thursday, August 17, 1995, Issue No. 13, 13:21.] Other fees, which included development fees and consulting fees to Matthews Group companies, Mr. Stehelin characterized as "abnormal expenses. They weren't presently or directly related to operating the airport." [*Ibid.*] Mr. Stehelin agreed that some of these amounts would be "money to the investors over and above the money they would get as investors in terms of the rate of the return." [*Ibid.*]

The following is a brief summary of the agreements for which evidence was presented to the Committee:

1. The most unusual of these agreements is one dated October 4, 1993, between T1T2 Limited Partnership (signed by both Mr. Peter Coughlin and Mr. Norman Spencer), and Matthews Investments 4 Inc. -- a company that does not appear anywhere else in the documents.³⁹ The document states, in its entirety, that:

"[T1T2 Limited Partnership] hereby agrees to pay to you a consulting fee of \$350,000 per annum for ten (10) years (payable monthly) commencing with the first payment on October 31, 1993.

³⁸ In fact, Mr. Allan Crosbie found that the pre-tax rate of return to the developers, without including these numerous side deals, was 23.6%. This is discussed below.

³⁹ A corporate search revealed that Matthews Investments 4 Inc. was only formed on September 30, 1993 -- barely one week before this \$3.5 million agreement was signed. Mr. Donald Matthews is listed as President/Chairperson, and a Mr. Richard J. Lachcik of Oakville, Ontario is entered as a first director. No other information could be obtained about the company -- its shareholders, its business (if any), or employees (if any).

"This contract may not be terminated for any reason and is assignable and may be assigned by you." [Committee Doc. 001573]

This is an undertaking to pay \$3.5 million as a "consulting fee," but with **absolutely no mention of any consulting, or indeed any other services to be provided**. The "no termination" clause ensures that **the contract could not be terminated if no services were ever provided**, let alone if the services were unsatisfactory.

Senator John Bryden observed during the hearings, "**[T]his looks to me very much simply like a promissory note. I promise to pay \$350,000 per year for 10 years commencing on October 31st.**" [Committee Transcript, Thursday, September 28, 1995, Issue No. 28, 28:17, emphasis added.] **And it could be fully assigned, at will, by Matthews Investments 4 Inc. to anyone -- to Mr. Don Matthews, to Mr. Jack Matthews, or theoretically even to a friend.**

2. Matthews Contractors Inc. was engaged as "Construction Manager for the Pearson Terminal Redevelopment Project" by letter dated October 4, 1993 from T1T2 Limited Partnership. That letter is lacking in detail: it notes vaguely that, "The extent of these services and the fees therefore are to be generally as per the proposed agreement previously delivered to you." The referenced agreement was not provided either to the Department of Transport or the Committee. [See: Letter dated October 4, 1993, attached as Exhibit 11 to the Affidavit of John N. Desmarais, No. 3, in the Ontario Court (General Division) litigation between T1T2 Limited Partnership and 2922797 Canada Inc., and Her Majesty the Queen in Right of Canada, Court File No. 94CQ55762.]

According to a corporate search of Matthews Contractors Inc., that company was only formed on September 29, 1993, leading one to speculate whether it was formed for the sole purpose of entering into this contract.

3. Paxport International Inc was to get a minimum of \$4 million over five years from T1T2 to promote Canadian airport development expertise and technology internationally. While apparently unrelated to the management and operation of Pearson Airport, this undertaking was referred to in a covenant from T1T2 in the Industrial Benefits Agreement, one of the Pearson Airport contracts. It would appear that the \$4 million was to come out of the revenue from Pearson Airport -- notwithstanding that its purpose, while ostensibly to benefit Canada, was at bottom to develop new business opportunities for Paxport. [See: Article 3.3 of the *Industrial Benefits Agreement* between T1T2 Limited Partnership and Her Majesty the Queen in Right of Canada, dated October 7, 1993.]

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4. Agra Industries Limited had an agreement dated May 15, 1992 with Paxport Management Inc, which provided:

"In consideration of AGRA's participation in the consortium, AGRA will be entitled to, on a preferred basis, as determined by the project manager, perform engineering and related services for performance of the redevelopment of the airport facilities."

Agra Industries Limited was the controlling shareholder in 2895820 Canada Limited, a partner in T1T2, and also the majority shareholder of Allders International Canada Limited, which owned two of the T1T2 partners.

In addition, Allders International Canada Limited had a 25-year lease to operate the duty-free shops at Terminals 1 and 2.

5. Norr Partnership Limited was to perform planning, architectural and engineering services, and overall design co-ordination for T1T2. Norr Partnership Limited was a shareholder of Norr Group Consultants Ltd, which in turn was the owner of 1027777 Ontario Limited, a partner in T1T2.
6. Pearson Airport Management was engaged by T1T2 to manage Terminals 1 and 2. Pearson Airport Management is a partnership with Claridge Holdings Inc. as one of the partners.
7. On October 4, 1993 Bracknell Corporation entered into 2 agreements with T1T2:

- (1) a management and operations agreement; and
- (2) an agreement for the installation of mechanical, electrical and communications cabling.

Bracknell Corporation owned 1045433 Ontario Inc. and 1045434 Ontario Inc., both partners in T1T2.

8. Patrick Brigham, "as a founding member of the Paxport Group" (Mr. Brigham and the Brigham family owned Hartay Enterprises, Inc., a partner in T1T2 Limited Partnership) was granted exclusive rights to provide travel agent services at all three terminals at Pearson Airport. This agreement was dated October 4, 1993, although not accepted by Mr. Brigham until November 10, 1993 -- well after the defeat of the Conservative Government, and indeed after the appointment of Mr. Nixon to review the Pearson Airport deal. [See: Agreement dated October 4, 1993, attached as Exhibit 5 to the Affidavit of John N. Desmarais, No. 3, in the Ontario Court (General

Division) litigation between T1T2 Limited Partnership and 2922797 Canada Inc., and Her Majesty the Queen in Right of Canada, Court File No. 94CQ55762.]

9. Lockheed Air Terminal of Canada Inc. ("LATOC") concluded a "consulting agreement" with T1T2 Limited Partnership, dated October 4, 1993. LATOC owned LAH Limited, the limited partner in T1T2 Limited Partnership. Under this agreement, LATOC was to receive \$450,000 each year for 7 years or until the completion of the redevelopment of Terminals 1 and 2, whichever was later. In exchange, LATOC was to serve as a "consultant" in connection with the management, operation, development and redevelopment of Terminals 1 and 2. [See: Agreement dated October 4, 1993, attached as Exhibit 10 to the Affidavit of John N. Desmarais, No. 3, in the Ontario Court (General Division) litigation between T1T2 Limited Partnership and 2922797 Canada Inc., and Her Majesty the Queen in Right of Canada, Court File No. 94CQ55762.]

These contracts alone would have brought in over \$170 million to these entities, according to their own claims in the pending litigation with the Government of Canada. **This \$170 million would have been over and above the negotiated rate of return that the Government had decided would have been fair for the developers.**

Perhaps the most serious problem with these non-arms length contracts was the essentially blank cheque written by the Government to the developers. **The Government gave up any significant ability to control self-dealing by the consortium.** The Pearson Airport agreements provided only that the Government had a right to receive copies of non-arms length contracts; while the contracts were supposed to be on terms "commercially equivalent to those which could be negotiated with an Arms Length party," no power was given to the Government to reject, to challenge, or to approve the terms of any such agreement. [See: Article 2.5, *Terminals 1 and 2 Complex Development Agreement*.]

The Government did not even ask to exercise its minimal right to review the non-arms-length contracts. The Hon. Jean Corbeil, then Minister of Transport, testified that he had no knowledge of the \$3.5 million contract to Matthews Investments 4 Inc., the only non-arms-length contract he was asked about. The first time he saw that contract was when presented with it during these hearings. [Testimony of the Hon. Jean Corbeil, *Committee Transcript*, Wednesday, September 20, 1995, Issue No. 21, 21:91.]

The Committee saw strong evidence of the Government's failure to exercise oversight over the non-arms-length contracts. The negotiating team, which had agreed that the Government would subsidize the airlines' share of the airport operating and management costs, admitted that they simply did not know whether these non-arms-length payments would be included in those costs, and thus subsidized by the Government as well as the

airlines and the travelling public. [Testimony of Mr. John Desmarais, *Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:83-84.]

Other Unusual Clauses

Mr. Stephen Goudge (legal counsel to Mr. Nixon) expressed concern that the contracts permitted:

"a number of deductions on the issue of gross revenue that, from my perspective after consultations, were unusual. That is, unusual in the sense that provided deductions that would underestimate what in other circumstances would be the gross rent. For example, rent paid by the Crown, bad debts, and so on." [*Committee Transcript*, Thursday, September 28, 1995, Issue No. 27, 27:13.]

He later commented on these clauses, noting that Pearson Development Corporation would have been allowed to deduct from its calculations of gross revenues "many generous deductions, unusual ones [such as] rebates and refunds, payments by Her Majesty as occupant of leased premises, bad debts...." [*Id*, 27:51-52.]

Other terms were also unusual, and these terms "inadequately protected the public interest." [Testimony of Mr. Stephen Goudge, *Committee Transcript*, Thursday, September 28, 1995, Issue No. 27, 27:12.] For example, the agreements, the *raison d'être* of which was to develop Terminals 1 and 2, did not provide for reversion of the terminals to the Crown in the event not all the development took place:

Mr. Goudge: [T]he term of the agreement provides for 57 years, regardless of whether or not the development beyond Stage 1B takes place.... An agreement whose purpose is redevelopment ought to provide, in my judgment, and particularly in this context, that if the development does not proceed, the leasehold interest returns to the Crown. The whole purpose of this was to get the development done.... Why the Crown should permit the property to remain with the lease holder if the development was not going ahead escaped me, particularly with an asset of this importance. [*Committee Transcript*, Thursday, September 28, 1995, Issue No. 27, 27:12-13.]

Mr. Goudge also found that the remedies given the Government if the developers defaulted on their obligations under the agreements, were seriously deficient. The only remedy provided was for the Government to take the airport back, and to run it. As Mr. Goudge testified:

"The whole object of this was for the Crown to get out of this business and, in the event of default to force an entire reversal of that is something that, because it is so

Draconian, is almost certainly not to be exercised." [Committee Transcript, Thursday, September 28, 1995, Issue No. 27, 27:14.]

Mr. Goudge explained that the government would have the option of stepping in:

"in the middle of a development that was partially completed and try to take over the operation. From my perspective ... that would be a disaster for the Government of Canada. There would be nothing worse than coming into the mess of a development where the developer had walked out.... **The mess for the travelling public and for the Government of Canada couldn't have been worse, in my judgment.**" [Committee Transcript, Thursday, September 28, 1995, Issue No. 27, 27:40-41, emphasis added.]

Other provisions also protected the interests of the developer at the expense of the public interest. For example, the provisions governing the mortgagee's rights to enforce its security under the leasehold mortgage gave very little protection to the Government. The Committee learned that in case of a default under the leasehold mortgage, the mortgagee would acquire extensive rights, with little (if any) power given to the Government to object:

"The mortgagee could enforce the security without a requirement that it complete further stages of construction, and it could then assign the lease to another lender, and the Government of Canada would be left with an operator of the airport over whom the Government of Canada had no control. **In other words, the Government of Canada would be left with not T1T2 but somebody, the identity of whom, the wherewithal of whom the Government of Canada would have no control over.**" [Testimony of Mr. Stephen Goudge, Committee Transcript, Thursday, September 28, 1995, Issue No. 27, 27:14, emphasis added.]

The agreement did not give the Government of Canada any power to withhold its consent to the mortgagee's assignment of the lease of the terminals. "All of a sudden the Government of Canada is dealing with a new tenant without any ability to control who the tenant is." [Ibid.] That new tenant could be anyone, including even a non-Canadian controlled developer who would not have qualified to submit a proposal for the project under the terms of the Request for Proposals.

The Return to the Investors

The Committee learned that the pre-tax rate of return to investors under the Pearson Airport deal was to be 23.6% -- a rate well in excess of any return the investors could have expected in the market. As a consequence of permitting such a high rate of return, the government would have lost over \$250 million over the term of the lease. Mr. Allan Crosbie, a senior financial analyst with Crosbie & Company, testified:

Mr. Crosbie: Under the deal, the government deal was valued at \$842 million or \$843 million. If the return to the investors had been 17.5, which -- I'll give you some background -- we think is perhaps something they could shoot for --

Senator Bryden: No, I just needed -- Let the figures speak for themselves.

Mr. Crosbie: The government would have got another \$200 million on top of the \$843 million.

Senator Stewart: So they left \$200 million on the table, then.

Mr. Crosbie: Under this, yes, \$200 million, it would appear, could well have been left on the table over 37 years.

Senator Bryden: No, over 57 years that would have been 252?

Mr. Crosbie: Over 57 years that would have been \$252 million -- that's right, about one-quarter of a billion dollars. [*Committee Transcript*, Thursday, September 28, 1995, Issue No. 27, 27:21.]

Mr. Crosbie also told the Committee that the 23.6% figure could well have been low. First, it did not include or reflect the fees that would have been paid to consortium members under the various non-arms-length contracts -- and the evidence shows that these would have yielded millions of dollars.

Second, **the model used by Transport Canada in assessing the return was not prepared independently by or for Transport Canada, but was prepared by Pearson Development Corporation itself.** [*Committee Transcript*, Thursday, September 28, 1995, Issue No. 27, 27:22-23.] As Mr. Crosbie noted,

"[I]t's highly unusual for a buyer to present an optimistic model to the seller. The buyer, I think, typically would present quite a conservative model because you're not going to go to a seller and say, 'Geez, look what a great deal I've done.'" [*Committee Transcript*, Thursday, September 28, 1995, Issue No. 27, 27:23.]

Notably, this was the first time the Committee learned that the Department had used a model provided by the developer.

The Department based its conclusion that the 14% *after-tax* rate of return was reasonable on the opinion of Mr. Paul Stehelin of Deloitte & Touche, set out in a letter dated August 17, 1993. However the Committee learned that, "although the letter was written in August, [Mr. Stehelin] was basing ... it off the higher rates in the spring." [Testimony of Mr. Crosbie, *Committee Transcript*, Monday, November 6, 1995, 1300-7.] The letter was not

updated "to reflect the rates that were closer to the rates that were in place at the time the letter was written." *[Ibid.]*

The Deloitte & Touche report relied on a Price, Waterhouse report in finding the 14% *after tax* rate of return to be reasonable. However, the Committee was told that the Price Waterhouse report had referred to a *pre-tax* rate of return of 11% to 13% as reasonable. *[Id., 1300-6.]* That figure would have been consistent with the results of a report prepared by DS Marcil for Transport Canada on a different project. In that report, DS Marcil suggested "a *pre-tax* equity return for the equity investors of 14.5 per cent, slightly more than the Price Waterhouse but in the same general range." *[Ibid.]*

Finally, the projected before-tax equity rate of return on the Terminal 3 project was 14.1 per cent. *[Id., 1300-7.]*

The evidence is overwhelming that the 23.6% before-tax rate of return was considerably higher than was necessary or appropriate. Mr. Crosbie testified that "the returns may, in fact, be higher than 23.6." *[Id., 1300-12.]* This return would be increased if one factored in the:

"additional profits potentially to the participants through their involvement in the concessions, the construction and the management fees.... Plus, you have synergies when you put T3 together with T1T2. Transport Canada told us they thought these synergies of putting these two together could be in the order of \$2 million. Plus, you now have virtually a monopoly situation where you have got control of these terminals in the hands of one party ... which creates opportunities in terms of pricing...." *[Committee Transcript, Monday, November 6, 1995, 1300-11-12.]*

The rate of return to the investors under this deal was very generous, and directly at the expense of the travelling public (higher fares) and the Crown (lower rate of return).

VI. SIGNING OF THE CONTRACT

By late August, 1993, the negotiating team had succeeded in resolving the most difficult issues that had divided the parties. [Testimony of Mr. Bill Rowat, *Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:14.]

On August 27, 1993, the Order in Council was issued, authorizing the Minister of Transport to enter into the agreements on Pearson Airport. [Order in Council, dated August 27, 1993, Committee Doc. 001345.] Mme. Jocelyne Bourgon, then Deputy Minister of Transport, was very clear that the effect of this authorization was to grant the Minister of Transport the "additional power" required in order to sign the agreements, but:

"[T]o have the power to sign is not an obligation to sign It is not a judgment on the circumstances. So to have delegated authority does not force you to exercise it." *[Committee Transcript, Thursday, September 14, 1995, Issue No. 19, 19:61, emphasis added.]*

On August 30, 1993, the Minister of Transport announced that a "general agreement" had been reached to redevelop and to operate Terminals 1 and 2, and that this would be finalized in the fall. [New Release Communiqué No. 187/93, dated August 30, 1993, Committee Doc. 002269.]

Legal counsel who testified were definite: as of August 30, 1993 -- and indeed, **right up until October 7, 1993 -- there was no contract between the parties.** When he testified, Mr. Robert Green, Q.C., Senior General Counsel, Department of Transport, explained that he had specifically asked that the word "general" be included in the press release to clarify that as of August 30, there was no agreement between the parties:

Mr. Green: ...I do remember asking that the word "general" be put in because I did not -- was not aware that an agreement had been entered into, did not think one had and understood this to be, as Bill [Rowat] already alluded to it, simply a strong statement that the minister wanted to make.

...
Senator Lynch-Staunton: ... What's the difference between a general agreement and an agreement? What is a "general agreement", then?

Mr. Green: As I understood it at the time, the message I was trying to convey to that was simply that there was no agreement. There was maybe an understanding, but I don't know. *[Committee Transcript, Monday, October 23, 1995, Issue No. 29, 29:44.]*

In fact, the witnesses described how "serious negotiation" continued right up until the signing. Mme. Bourgon testified that, "**We were still negotiating 24 hours before I asked the minister to sign some of the documents.**" [*Committee Transcript*, Thursday, September 14, 1993, Issue No. 19, 19:86, emphasis added; see also testimony of Mr. Jacques Pigeon, *Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:14.]

Mr. John Desmarais of Transport Canada told the Committee how one document was not completed by late September, and in fact, as late as September 20, 1993, the government negotiators were telling the consortium that they would not close the deal until that document was finalized:

"We, at August 27th, did not have a management and operations plan. That was a substantial piece of negotiations during September, for the plan and the agreement itself, and in fact at one point we said, on September 20th, that we weren't willing to close unless that was finalized." [*Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:15.]

The Department of Justice officials explained that the Terminal 1 and 2 transaction was "a one-tier transaction." [Testimony of Mr. Jacques Pigeon, *Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:9.] In consequence, "parties will sign documents in advance, not with the intent of binding themselves at the moment they sign them but simply as a matter of administrative procedure so that they would be ready for closing, assuming all the other conditions precedent to that closing are met, or the parties otherwise agree to the closing itself." [Testimony of Mr. Robert Green, *Committee Transcript*, Monday, October 23, 1995, Issue No. 29, 29:24.] In other words, as Mme. Bourgon succinctly expressed it: "[I]t is not over until it is over." [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:86.]

Mr. Rowat was emphatic in a letter to our Chairman:

"It was my view at that time, and it is still my view now, that the Pearson Contract was not concluded unless and until all the documents were signed by the parties, including those signed on October 7, 1993, and all necessary release from escrow had taken place, which event occurred only after Peter Coughlin and I had signed the *Authorization to Release Escrowed Documents*." [Letter from Mr. Rowat to Senator Finlay Macdonald, dated September 22, 1995.]

The evidence of the public servants was definite. In their view there was no binding agreement until October 7, 1993. Mr. Stephen Goudge agreed, noting that, "There is no law of 'semi-contract'." [*Committee Transcript*, Thursday, September 28, 1995, Issue No. 27, 27:32.] Mr. Goudge went on to state his legal view that "the contractual rights at issue here speak as of October 7th, not before."

When questioned by Mr. Nelligan regarding whether the government would have been liable for damages if it had not proceeded to close the transaction, Mr. Goudge replied: "We had no detailed discussion ... about that.... My own view would be that to stretch any doctrine of law to take in potential damages other than contract damages in this circumstance would be difficult." [*Id.*, 27:37.]

On September 8, Parliament was dissolved; the election campaign began. At the same time, several news stories appeared in the press, exposing problems with the projected deal and with the process that had been followed. [See: "Response to points raised in the Greg Weston Citizen articles of Saturday, September 25, 1993 and Sunday, September 26, 1993," dated September 28, 1993, Committee Doc. 001266.]

The projected deal became a major issue in the campaign. On October 5, 1993, the Leader of the Opposition, Mr. Jean Chrétien, said publicly: "I challenge the Prime Minister to stop that deal right now.... You don't make a deal like that three weeks before an election when hundreds of millions of dollars are at stake.... I'm proposing a very simple thing -- put it in the fridge for three weeks and let the government that is there deal with it after [the election]." [Quoted by Patrick Doyle and Bruce Campion-Smith, "Halt deal at airport Chrétien tells PM," *The Toronto Star*, October 6, 1993.]

The next day, Mr. Chrétien was even more explicit. "I'm warning everyone involved: If we become the government, it will be reviewed, and if legislation is needed [to overturn the deal] we will pass legislation." [André Picard and Jane Coutts, "Chrétien attacks Pearson deal," *Globe & Mail*, October 7, 1993.]

When the time came to close the deal in October, Mr. Rowat consulted with his Deputy Minister as to whether or not he should proceed:

Senator Bryden: Is it normal for the Prime Minister to direct a contract to be signed?

Mr. Rowat: These were not normal circumstances. So under normal circumstances, no, it would not.

Senator Bryden: What was different about these circumstances?

Mr. Rowat: There was an election under way, and this was a particularly contentious issue. So in speaking to the deputy minister, Jocelyne Bourgon, she had drawn the conclusion, as had I, that if I were to sign these documents as a senior civil servant at this point in time, I should have very explicit instructions. It was to her and I suppose Glen Shortliffe to sort out exactly how and who should provide

these instructions. [*Committee Transcript*, Thursday, August 3, 1995, Issue No. 10, 10:75-76.]

Mme. Bourgon elaborated on this point, explaining that with the dissolution of Parliament came the need for the public servants to satisfy themselves that indeed the government wished to make the agreement. Accordingly, around the end of September (before submitting the documents to the Minister of Transport for his signature), Mme. Bourgon sought political guidance from her Minister. [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:57.] She described the situation to the Committee:

"After Parliament was dissolved, what happens in terms of conduct for officials is that there is this general rule. It's not a law. There is a general rule that from that point on, you must act with caution. So the question comes, who is going to make a judgment as to whether or not you're cautious. Well, that's not a judgment for officials. You go to your minister or the first minister, the Prime Minister, depending on the circumstances." [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:59.]

Even though an election was underway, the Hon. Jean Corbeil, Minister of Transport, proceeded on October 4 to sign a number of the documents. This was the first step in that Government's attempt to bind its successor to this deal.⁴⁰

After the Minister of Transport had signed some of the documents and before the deal was scheduled to close on October 7, two events occurred which caused Mme. Bourgon to seek explicit direction from the Prime Minister whether or not to proceed. She described what happened:

Mme. Bourgon: Following that, there were two events, additional events, that took place. One of them was you have to remember that this is during the middle of an election campaign. There was a statement by the Leader of the Opposition requesting publicly the Prime Minister to put everything -- I think he used the expression -- in the freezer.... The day after,... on the 6th, I believe there was also a statement by the Leader of the Opposition to the effect that he would wish, should he form the government, to review the approach.

⁴⁰ Some Conservative Committee members suggested that the Government was bound, and liable, as of August 30, 1993, the date of the Order in Council. However, it is clear that under federal statute, the Government is not bound by any contract unless it is signed by the Minister. [See, eg, the *Department of Transport Act*, c. T-18; the *Federal Real Property Act*, S.C. 1991, c. 50.] And in any event, the evidence was unrefuted that in this case, the Pearson Airport Contract was not concluded until *all* the documents had been signed and released from escrow, namely on October 7. [See: Letter from Mr. Rowat to Senator Finlay Macdonald, dated September 22, 1995.]

These two events raised in my mind the need to receive guidance on the appropriateness of proceeding further, which is closure on the 7th, but this time from the Prime Minister. Because the Prime Minister is responsible for the behaviour of government during a period of election. And the call having been made at the level of the Leader of the Opposition, in my mind, it was not sufficient to simply ask guidance from the minister at that point in time. So that was the background.

Now, it's not for the Deputy Minister of Transport to get on the phone and call the Prime Minister and say, "I wish to get guidance." You refer the matter to the clerk, whose job it is to make sure that we respect tradition and values and due process and so on. And when I raised my view with the clerk, the clerk was also of the view that it was appropriate to seek guidance from the Prime Minister. He did and gave me my instruction." [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:59-60.]

Mme. Bourgon told the Committee that the Prime Minister need not have proceeded with the closing.

Senator Tkachuk: The Prime Minister didn't have to sign any contract.

Ms. Bourgon: No.

Senator Tkachuk: What did she have to do?

Ms. Bourgon: She had to indicate what was the wish of the Leader of the Government as to the appropriate behaviour of her government during that period of time....

Senator Tkachuk: So if she would have said "no", then the wishes of the Treasury Board and all the ministers would have been turned down.

Ms. Bourgon: If the Prime Minister had said, "It is the wish of my government to defer agreements of this kind for the next three weeks," then we would have got people together and found all the options possible to give material effect to that wish. [*Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:89.]

To implement her instructions, on October 7, 1993, Mme. Bourgon faxed a message to Mr. Rowat, with copies to Mr. Shortliffe, Mr. John Tait (Deputy Minister of Justice), and the Hon. J. Corbeil:

- 1) The Prime Minister, the Right Honourable Kim Campbell, has instructed Mr. Glen Shortliffe to proceed with the signature of the

remaining legal documents concerning the transfer of T1/T2 this afternoon at 14 00 hrs.

- 2) The Minister, the Honourable Jean Corbeil, has been informed of this decision and is in agreement.
- 3) You are therefore authorized to sign the relevant documents on behalf of the Crown.
- 4) The above has been reviewed by Mr. Shortliffe and he has confirmed that these are the explicit instructions received from the Prime Minister." [Fax to B. Rowat from J. Bourgon, dated October 7, 1993, Committee Doc. 00092.]

These instructions were implemented. On that day the balance of the documents were signed, and the Pearson Airport Agreements were the result.

But it was clear to public servants that the controversy surrounding this deal was not going to die down. The Committee was shown an unusual exchange of electronic mail among several Treasury Board officials, beginning with a note from Mr. Andy Macdonald to Mr. Mel Cappe, Mr. Ian Clark, Mr. Richard Paton and Mr. Jean-Guy Fleury, dated October 12, 1993:

"At the DM retreat last week, Jocelyne Bourgon asked my advice on a study she was contemplating... a review of the entire decision and advice process in the Pearson Airport decision. She is more than a little concerned that some public servants might get hung out to dry on this one at some future date, and wanted to have a complete file on the entire process. I said that it sounded like a reasonable thing to do, but that I would touch base within the TBS to solicit other reactions from affected parties. What do you think about this proposal?" [Committee Doc. 002068]

Mr. Cappe sent off his assent quickly -- half an hour later:

"Andy, we should prepare a complete file on this. Sid, could you pull our stuff or at least a chronology on it together should the AG or the next gov't decide to do something." [Committee Doc. 002068]

There is an interesting handwritten note on the page, apparently from Mr. Ian Clark:

"I tend to like this. It is going to get public anyway." [Committee Doc. 002068]

And of course, Mr. Clark was correct; it did "get public."

Signing During the Election Campaign

The most outrageous act of the previous Government in this entire story was the decision to enter into the contract after Parliament had been dissolved, and that Government was fighting for its existence in a general election. It was evident by then that the Conservative Government was headed for defeat. If the deal was good, it would still be good three weeks later. Deep suspicions were raised about the virtues of the agreement by the Government's obvious fear that the deal might not be acceptable to a different Government. Otherwise, why did they not agree to wait until after the election to have the deal signed?

The issue of the propriety of Ms. Campbell's decision to make this controversial contract during the election was considered by the Committee. The witnesses confirmed that such action flew in the face of established Canadian practice; one witness stated categorically that Ms. Campbell's actions demonstrated an unprecedented "reckless disregard for propriety." [Testimony of Professor John Wilson, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:15.]

Mme. Bourgon, now Clerk of the Privy Council, testified that it is the practice of the Canadian Government to act with caution during an election. She elaborated:

"I think the general rule of conduct to act with caution during an election means that you would consider factors such as: Is it a transaction that is going to bind future governments? What is the -- are there alternatives? Are there urgencies in the matter? Is there an obligation to act? Is there controversy?" [Committee Transcript, Thursday, September 14, 1995, Issue No. 19, 19:100.]

Professor John Wilson, a professor of political science at the University of Waterloo, testified that there is at least a practice in Canada, and possibly even a constitutional convention, that should have restrained the Campbell government from signing the Pearson Airport agreements during the election.

In Australia, this convention is explicit, and in fact, committed to writing. Known as the "caretaker convention," it requires a Government "to avoid implementing major policy initiatives, making appointments of significance **or entering major contracts or undertakings during the caretaker period** [after a dissolution of Parliament]..." [Committee Transcript, Monday, September 25, 1995, Issue No. 25, 25:34.]

Professor Wilson analyzed the testimony of Ms. Bourgon on the practice of the Canadian Government during an election period, and observed, "Madam Bourgon effectively

stated the existence, I think, of the caretaker convention in Canada." [Committee Transcript, Monday, September 25, 1995, Issue No. 25, 25:14.] He went on:

"It may be impossible to be absolutely certain on the points I want to mention now, but I'm unaware of any examples, and indeed I should be unaware of any examples in the years since the end of the First World War of governments in Canada in the caretaker period behaving with such reckless disregard for propriety as, in my view, Prime Minister Campbell showed when she authorized the final signing of the Pearson Airport Agreements on October 7, 1993.

"The issue was very clearly one of considerable controversy. The then Leader of the Opposition had vowed to cancel the agreement if his party won the election, which ought to have enough, in my view, on the basis of the examples I've described, to stop the process. An enormous amount of public money was involved, and the agreement locked the Government of Canada into a very long-term leasing arrangement which equally should have made it an inappropriate candidate for decision-making in the caretaker period, and it wasn't urgent, as we now know, I understand.

"But most importantly -- and in my particular view of the way in which the system operates I guess I'm bound to say this -- most importantly, I think, the decision was clearly made at a time when the Prime Minister and those around her must have known that her government was likely to be defeated. The Gallup poll published on September 22 showed the Liberals at 37 per cent and the Conservatives at 30 per cent, down from 36 in August. The Gallup poll published a month later, on October 21, put the Conservatives at 16 per cent.

"Now, I don't have to see internal party polls to know that around October 7, midway between those two dates, the government was very likely at 20 per cent, or not very far away from it. Whatever was being said for publication, I don't believe for one minute that the Prime Minister was not aware of that catastrophic political situation. The hard facts of the case must therefore be that she chose to authorize the signing of the Pearson Airport agreements at a time when she knew that she would not be able to take responsibility for the consequences of that decision. And that looks very close to me like the work of a government which has already lost the moral authority to govern. **To say that her decision was a constitutionally inappropriate exercise of power is, in my view, to put it mildly, but in the context of our customs and those of other parliamentary systems it, in my view, is also enough to justify whatever steps have to be taken to terminate the agreement.**" [Committee Transcript, Monday, September 25, 1995, Issue No. 24, 24:15-16, emphasis added.]

The two other political scientists testifying before the Committee were reluctant to say that Ms. Campbell's actions breached a constitutional convention -- that term is used in

different ways by different authorities. However, Professor Andrew Heard of Simon Fraser University criticized the signing in the middle of the election campaign, saying, "**It's not in keeping with past political practice and it's I think an issue that certainly raises the question of whether it was prudent or not.**" [*Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:42, emphasis added.] Professor J.R. Mallory of McGill University did not mince his words, describing the signing as "**bizarre and imprudent.**" [*Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:43, emphasis added.]

Of course, the Canadian electorate was unequivocal in its condemnation of that Government's actions. The Committee saw correspondence sent to Ms. Campbell from citizens in Mississauga, protesting her ministers' "cavalier" attitudes to Mississauga residents, that "had achieved new heights in arrogance." One of those who wrote anticipated the residents' concerns manifested in reports:

"such as... "The Report of Twenty-seven Million Taxpayers watching their Government Give Tory Hacks Canada's only Profitable Airport." You will soon be reading these reports. They will be delivered one at a time into a ballot box." [Letter from Mr. Lawrence Mitoff to the Hon. Garth Turner, dated October 2, 1993, Committee Doc. 002314.]

Mr. Mitoff added a postscript: "Please consider this my resignation from the Progressive Conservative Party. Attached is my membership card."

Mr. Mitoff was not alone. The Progressive Conservative Party of Canada was reduced from one hundred and fifty-two seats to two seats in the House of Commons; and in Ontario, home of Pearson Airport, every one of the Conservative candidates for election was defeated.

VII. REVIEW BY MR. ROBERT NIXON AND CANCELLATION

Consistent with his promise, one of Mr. Chrétien's first acts after the election was to appoint Mr. Robert Nixon, former Ontario Treasurer, on October 28, to review "all factors relating to the agreement between Pearson Development Corporation and Transport Canada for the redevelopment of Terminals 1 and 2 at Lester B. Pearson International Airport; and produce a report by November 30, 1993." [Articles of Agreement, Consulting and Professional Services between Her Majesty the Queen in Right of Canada and Mr. Robert Nixon, Committee Doc. 002348.]

Mr. Nixon engaged Mr. Stephen Goudge, a lawyer with Gowling, Strathy & Henderson, and Mr. Allan Crosbie, a financial adviser with the specialty merchant bank of Crosbie & Company, to assist him in his review.

Mr. Nixon was assigned a difficult task, made more challenging by the time constraints -- time constraints that were necessitated by the new Government's desire to move forward expeditiously with respect to Pearson Airport. (At that time, of course, the Government could not foresee that its actions to implement its chosen policy would be frustrated by the Conservative majority in the Senate.) However it is plain from the evidence that Mr. Nixon and his team were able to identify and to consult enough individuals so as to obtain sufficient insight into the substance and process of the Pearson Airport deal, and to arrive at recommendations for the Prime Minister.⁴¹

Clearly Mr. Nixon and his advisers could not, within one month, meet with all those heard by this Committee over four months. They did meet with representatives of both Claridge and Paxport, Transport Canada officials, community representatives, including representatives of the Toronto LAA, to name a few. They then analyzed the agreements, to ascertain whether or not the provisions were in the best interests of Canada.

This analysis was conducted by Mr. Goudge, an eminent lawyer, who looked at the provisions from a legal perspective, and by Mr. Crosbie, who was able to examine the financial provisions and put them in an appropriate context for Mr. Nixon's consideration. Indeed, this Committee benefited considerably from insights into the substantive agreements provided by Mr. Goudge and Mr. Crosbie.

⁴¹ Mr. Chern Heed, General Manager at Pearson Airport, warned Mr. Nixon during his study that "there were more people dealing with Pearson airport at Ottawa than there were at Pearson." It would have been impossible for Mr. Nixon to meet with everyone involved in the file. [Testimony of Mr. Robert Nixon, *Committee Transcript*, Tuesday, September 26, 1995, Issue No. 25, 25:36.]

Mr. Nixon concluded as follows:

"My review has left me with but one conclusion. To leave in place an inadequate contract, arrived at with such a flawed process and under the shadow of possible political manipulation, is unacceptable. I recommend to you that the contract be cancelled." ["Pearson Airport Review," dated November 29, 1993, Tab "O" of the Committee Briefing Book.]

On December 3, 1993, the Prime Minister of Canada released Mr. Nixon's report to the public, announcing as he did so that the Government would cancel the contract for the privatization of Terminals 1 and 2. [Press Release, Office of the Prime Minister, dated December 3, 1993, Tab "O" of the Committee Briefing Book.]

VIII. ISSUES

A number of issues are raised by this evidence:

1. Why did the Government adopt a "private sector solution" for Terminals 1 and 2 at Pearson Airport?
2. Was there an alternative solution for Pearson?
3. Was the Request for Proposal process consistent with government policy?
4. Was there political interference with the process?
5. Were lobbyists allowed excessive access and influence?
6. Notwithstanding the process, was the final deal in the best interests of Canada?
7. Was it proper for the Government to direct the execution of this controversial deal during the election campaign?

Each of these will be considered below.

IX. CONCLUSIONS

1. Why did the Government adopt a "private sector solution" for Terminals 1 and 2 at Pearson Airport?

The evidence is clear that, as Mr. Glen Shortliffe testified, the decision to privatize Terminals 1 and 2 at Pearson Airport was "a departure from the generally announced LAA policy." The departure was justified by both Mr. Shortliffe and the Hon. Doug Lewis, former Minister of Transport, on the grounds that it was needed "to address what was perceived as a crisis at Pearson." [Testimony of Mr. Glen Shortliffe, *Committee Transcript*, Thursday, July 1, 1995, Issue No. 4, 4:70.]

However, the evidence shows that by the time the Request for Proposals (the "RFP") was issued, there was no crisis at Pearson. The recession had hit the airline business in Canada "like a tidal wave." [Testimony of Mr. Dominic Fiore, Air Canada, *Committee Transcript*, Wednesday, August 16, 1995, Issue No. 12, 12:76.] Increased passenger volumes were nonexistent.

No one wanted the redevelopment to proceed: Air Canada was on the record opposing it, as were Canadian Airlines and the rest of the airline industry. The Air Transport Association of Canada made repeated representations to the Minister of Transport, asking that the Government delay any redevelopment until the recession had ended, passenger traffic had revived, and the airlines could afford the rent increases the redevelopment would entail. These pleas were barely acknowledged, and certainly were not heeded. The Association received a reply to their November 29, 1991 letter to the Minister the following May -- two months after the RFP issued. [Testimony of Mr. Gordon Sinclair, *Committee Transcript*, Thursday, August 17, 1995, Issue No. 13, 13:78.]

Even Claridge, who ultimately controlled T1T2 Limited Partnership, had opposed the issuance of the RFP, saying it was neither needed nor wanted by the industry. They even offered, should their predictions of traffic levels be wrong, to make renovations "at their own cost... in a matter of months, at no cost to the Government [that] would provide ample capacity beyond the year 2000." This offer was not accepted. [Letter from Mr. Peter Coughlin to the Hon. Gilles Loiselle, dated November 13, 1991, Committee Doc. 001137.]

The only advocates for the redevelopment project were the Paxport consortium -- a group lead initially by Mr. Don Matthews, Mr. Jack Matthews, and Mr. Ray Hession: individuals with impeccable connections to the very top of the Conservative Government and throughout the public service, but who are notably lacking in any airport experience. Mr. Jack Matthews told the Committee how he would regularly be

asked, at the beginning of meetings to promote Paxport as a contender for the project, "Jack, what business do you have in the airport business?" He could only point to his rejected proposal for the Terminal 3 project. [Testimony of Mr. Jack Matthews, *Committee Transcript*, Thursday, September 21, 1995, Issue No. 22, 22:130.]

Why did the Government proceed to issue the RFP in March 1992? The answer may have been provided by Mr. Don Blenkarn, Conservative Member of Parliament for Mississauga South. While openly declaring that he was in favour of selling off the airports to pay down the national debt, Mr. Blenkarn wrote to the Hon. Jean Corbeil three days before the RFP was issued, saying, "What comes through to all sorts of people critical of our government is some sort of a quick pay off to friends who want to develop airports.... [The other Mississauga MPs] and I know the close relationships that [a] number of the proponents of airport reorganization and their relationship with our Party and how supportive they have been in the past. In our view, the name of the game is to get elected....[T]he whole proposal at this point does not balance and our detractors clearly know that." [Letter from Mr. Don Blenkarn to the Hon. Jean Corbeil, dated March 13, 1992, Committee Doc. 000996.]

Did the Government have to proceed with the project? Clearly not; as late as November, 1992 -- after the proposals had been evaluated but before the announcement of the selection results -- the Prime Minister had asked the Clerk of the Privy Council to look into bid compensation for the proponents. However, compensation would have covered only the proponents' costs in preparing the proposals; it would not have provided any part of the profit expected to accrue over the life of the lease to the firm with the winning proposal. This option was not pursued; the project continued.

2. Was there an alternative solution for Pearson?

The Toronto Local Airport Authority, known as the Greater Toronto Regional Airports Authority ("GTRAAs"), was at all relevant times willing and able to negotiate with the Government to take over Pearson Airport. This approach would have been consistent with the Government's policy for airport management, and consistent with developments at other major airports throughout Canada.

At every stage, however, the GTRAAs encountered obstacles placed by the Government. The evidence shows that a different standard was imposed for the GTRAAs than was imposed for each of the local airport authorities ("LAA's") in five other major Canadian cities. And the evidence is equally clear that the decisions which created this double standard were made by the Minister of Transport himself.

The Hon. Doug Lewis, then Minister of Transport, could give the Committee only one reason why he did not pursue the LAA option for Pearson: the "crisis" at Pearson demanded

urgent action, and the Government could not wait for the LAA for Pearson. However, as described above, by the time the RFP was issued in March 1992, there was no crisis at Pearson. In fact, the airline industry (including Air Canada and Canadian Airlines) was arguing strenuously against any steps to develop Pearson at that time.

Furthermore, Mr. Michael Farquhar, the Transport Canada official responsible for negotiating airport transfers to all emerging LAA's, testified that by June 1992, there was a group in Toronto with whom Transport officials could discuss airport transfers. [*Committee Transcript*, Tuesday, July 25, 1995, Issue No. 5, 5:79.]

The main excuse given by the Minister of Transport for refusing to recognize the GTRAA was the insistence by the Region of Peel that the Toronto Island Airport be included within the transfer of airports to the GTRAA. But it became clear that this was but an excuse. When the Minister of Transport provided this rationale in a letter to the GTRAA refusing them recognition, officials added a handwritten notation to the permanent file copy: "Notwithstanding the above observations, the Toronto LAA already would appear to meet the government's prerequisites for becoming a LAA consistent with the criteria applied to the first four LAA's." [Committee Doc. 000549]

The evidence shows that a similar difference of opinion between the federal government and a local municipality regarding whether a second local airport ought to be within the jurisdiction of the local LAA had not impeded the transfer of Edmonton International Airport to an LAA in Edmonton. The Minister of Transport "was very familiar with the Edmonton situation." [Testimony of Mr. Michael Farquhar, *Committee Transcript*, Thursday, July 27, 1995, Issue No. 7, 7:49-50.]

Why was the Government so solicitous of the concerns of one local municipality (out of 35)? The same Government flatly ignored a strongly worded resolution of the Toronto City Council expressing its "opposition to the privatization of Terminals 1 and 2" and requesting "that the Government of Canada re-open and reverse its decision, permitting further consideration." [Letter to the Rt. Hon. Kim Campbell from Deputy City Clerk, City of Toronto, dated October 18, 1993, Committee Doc. 002086.]

There is extensive evidence that by the time the RFP process was underway, and certainly by the time negotiations began with the developers (May 5, 1993), there was an LAA in place willing and able to negotiate a transfer of Pearson Airport. The excuses given for not proceeding with the Toronto LAA were clearly lacking in substance. The question remains, why did the Government insist upon a different policy for Canada's most profitable airport? The only possible conclusion is that the Government had a different agenda for that airport.

3. Was the Request for Proposal process consistent with government policy?

Mr. Stephen Turner, Director, Central Government Services Review Directorate, told the Committee that the Government of Canada procurement process is "founded on three fundamental operating principles: **Competition**, which for us means open bidding; **equal treatment**, which ensures that all suppliers are treated according to the same conditions and evaluated according to the same criteria; and the last one is **openness and transparency**." [Committee Transcript, Wednesday, July 1, 1995, Issue No. 3, 3:106, emphasis added.] Mr. Al Clayton, Executive Director, Bureau of Real Property and Material, confirmed that these same principles govern leasing contracts such as the Terminal 1 and 2 deal. [Committee Transcript, Wednesday, July 1, 1995, Issue No. 3, 3:107.]

These were not the governing principles of the T1T2 process.

The Transport officials believed an expression of interest stage should be used, as it had been for Terminal 3. [See, eg, "What are the various ways that a developer can be retained?" dated January 8, 1991, Committee Doc. 001063.] **They went so far as to prepare a draft call for expressions of interest.** [Testimony of Mr. Wayne Power, Committee Transcript, Wednesday, July 26, 1995, Issue No. 6, 6:13, and draft "Call for Expressions of Interest," dated June 5, 1991, Committee Doc. 001060.]

Only Paxport opposed an expression of interest stage; Of the other two known potential bidders, Canadian Airports Limited advocated a two-stage process, while Airport Development Corporation (which became Claridge) opposed the whole redevelopment as unnecessary. [Committee Doc. 001114]

Paxport lobbied hard against an expression of interest stage. The Minister overruled his officials, and ordered that, "There will be a single stage proposal call process, i.e. no Expression of Interest or Qualification stage." [See: Memorandum from L.A. McCoomb to V.W. Barbeau dated August 21, 1991, Committee Doc. 001047.]

At the same time that Paxport was arguing that an expression of interest stage was unnecessary because three interested developers were already known, it was also pressing for the disqualification of the other bidders. Paxport was successful with one -- Canadian Airports Limited may not have qualified because of the Canadian control requirement in the RFP. Happily for Paxport, they were not successful in disqualifying Claridge; that company eventually rescued Paxport from losing the project altogether.

There was abundant evidence that **the Government knew that a 90-day period to respond to the Request for Proposals was inadequate and would deter potential proponents.** Price-Waterhouse recommended that a **six-month period** be used. [See, eg,

Memorandum from Mr. Chern Heed to Mr. V. Barbeau dated October 29, 1991, Committee Doc. 000639.]

Paxport lobbied the Minister heavily for a short response period. Again, the Minister overruled his officials, and ordered, "The RFP will require that proposals be submitted 90 days from release of the RFP." [Memorandum from L.A. McCoomb to V.W. Barbeau, dated August 21, 1991, Committee Doc. 001047.]

The combination of having a one-stage process, and then allowing only 90 days to respond to the RFP, meant that it was impossible for new groups to enter the competition on a level playing field. Mr. Hession testified before the House of Commons Standing Committee on Transport that Paxport found the 90-day period "extremely demanding. I had to create, virtually overnight, a team of 60 people concentrated in a particular office in Toronto, to work seven days a week about 20 hours a day for the entire period, to succeed in getting that proposal submitted." [*Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Transport*, Thursday, May 26, 1994, Issue No. 7, 7: 19.]

If Paxport itself, which had been created for the single purpose of going after this particular project, and had been gearing up for this RFP since 1989, found 90 days almost too demanding, how could any newcomer possibly hope to succeed?

Why did the Government chose not to emulate the process used for Terminal 3 -- which witnesses told the Committee has now become a model of how public proposal calls should be handled -- for Terminals 1 and 2? Witnesses testified that the Terminals 1 and 2 project was much more complicated than the Terminal 3 one, but the contrast in approaches was striking.

While the Terminal 3 project proceeded first with a call for expressions of interest and then an RFP, the Minister insisted personally on a one-stage process for Terminals 1 and 2. While a full seven months elapsed before the call for expressions of interest and the due date for proposals on the RFP for Terminal 3, the Minister directed that there be only 90 days to prepare and file the proposals for Terminals 1 and 2. [See: testimony of Mr. Wayne Power, *Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:18, 38; testimony of Mr. Ed Warrick, *Committee Transcript*, Wednesday, July 1, 1995, Issue No. 3, 3:27, 37.]

The Minister similarly accepted Paxport's representations and overruled his officials with respect to waiting for the results of the environmental assessment review of the runway project.

On May 16, 1991, Mr. Chern Heed was able to say that, "Clear commitments have been made to the public that no steps to expand the capacity of Pearson Airport will be taken until after the results of the environmental assessment review is known." [Memorandum dated May 16, 1991, Committee Doc. 001161.]

Paxport lobbied hard to convince the Minister that there was no need to wait for the results of the environmental assessment. And the August 21, 1991 memorandum records the Minister's explicit direction, "The RFP may be released prior to completion of the EARP review of the Department's proposal to construct new runways at LBPIA." [Memorandum from L.A. McCoomb to V.W. Barbeau, dated August 21, 1991, Committee Doc. 001047.]

The rumour that the Government was going to proceed with the RFP prior to the EARP report was enough to make at least two members of the EARP panel threaten to resign. [Letter from Mr. Peter Coughlin to the Hon. Gilles Loiselle, dated November 13, 1991, Committee Doc. 001137.]

The RFP was issued on March 16, 1992 -- five months before the EARP report was released on November 30, 1992. That report found that there was "no likelihood that passenger aircraft movement demand will reach the levels projected ... for 1996 before the year 2001 and maybe even later; there is no serious and continuing problem of traffic congestion at Pearson at the present." [*Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:17.]

The criteria used to evaluate the proposals were the weightings lobbied for by Paxport. Paxport wanted (understandably) to minimize the weight given to the proponent's financial strength, and to maximize the weight accorded the promised "return to the Crown." [See, e.g., letter from Mr. Hession to Dr. Huguette Labelle, dated January 18, 1991.]

The evaluation criteria -- which were approved by the Minister -- allotted only 5 per cent of the weighting to the proponents' financial qualifications; while of the 40 per cent points assigned to the proponents' business plan, 50.6 per cent was allotted to the proposed return to the Crown. [See: *Proposal Evaluation Report*, Committee Doc. 001765; testimony of Mr. Ron Lane, *Committee Transcript*, Wednesday, July 26, 1995, Issue No. 6, 6:59-60.]

The evaluation process was severely hampered by not having a proper basis for comparison with what would have happened had Transport Canada undertaken the redevelopment itself. A Transport Canada document noted that "[Paxport's] proposal would imply an attractive financial return to the government.... However, the Evaluation Report has made no comparison of the return to the government under [Paxport's] proposal with a 'business as usual' assumption under a continued government operation of the airport. A so-

called government base case was not undertaken as part of the RFP exercise." [See: "Considerations related to the potential redevelopment of Terminals I and II," dated November 3, 1992, Committee Doc. 001445.]

The Committee learned that it was the Minister who expressly ordered that no such "Crown Construct" base case be prepared. [Memorandum from L.A. McCoomb to V.W. Barbeau, dated August 21, 1991, Committee Doc. 001047.]

It is evident from the Evaluation Report that the Evaluation Committee was well aware that the Paxport plan was precarious, especially when compared with the plan submitted by Claridge. Claridge's Business Plan was described as "a sound, conservative and achievable Business Plan, which recognizes the current financial realities of the airline industry in establishing a pricing strategy (low charges for the short-term, 1 - 8 years or so, rising only after Phase 1 construction is completed in 1998)." [Proposal Evaluation Report, Committee Doc. 001765, p. 90.]

In contrast, "the critical assumption in [Paxport's] Business Plan is that a large portion of the capital costs as well as the payments to the Crown can be passed on to the airlines, and that it will be possible to renegotiate airline leases to conform to their pricing strategies and levels.... Any of these matters could result in [Paxport] having to scale down the scope of the project or to delay redevelopment, particularly Stage 1. They could also cause reductions in payments to the Crown, *as well as bring into question the financial viability of the proposal.*" [Proposal Evaluation Report, Committee Doc. 001765, p. 90.]

Nevertheless, Paxport's proposal was selected as the best overall acceptable proposal. And as anticipated, the failure of Paxport to recognize the current financial realities of the airline industry, and their own lack of a solid financial base, meant that they could not finance their proposal. Within just a few days of the announcement that their proposal had been selected, they were negotiating a merger with Claridge.

One is forced to wonder whether this was not simply a process to ensure that Paxport got "a piece of the action" with funding from Claridge's deep pockets, rather than a true open competition. The entire process, from start to finish, seemed crafted to ensure the selection of Paxport's proposal, against logic, experience and simple common sense. Why select a proposal that on its face required radical increases in airline rents, at a time when the major Canadian airlines were on the verge of financial collapse? Why discourage new competitors by setting the 90-day deadline? And why ignore the financial ability of the proponent to carry out the proposal, in assessing each proposal's merits?

If all this was not calculated to enhance Paxport's chances to win the proposal, then it was an example of bad management: it was a gambler's roll of the dice with Canada's largest and most important gateway to international markets. And it is clear from the evidence where responsibility for these decisions lies -- the Minister(s) of Transport, and the Prime Minister of Canada.

4. Was there political interference with the process?

This was probably one of the most difficult issues before the Committee. Without access to Cabinet or ministerial documents, or discussions between public servants and ministers, it was impossible to learn whether there was any political interference. **However, it was clear from the evidence that there was an unprecedented level of interest taken in this transaction on the part of the Privy Council Office; an Office which received its directions directly from the Prime Minister.** [See, eg: Testimony of Mr. David Broadbent, *Committee Transcript*, Wednesday, August 2, 1995, Issue No. 9, 9:109.]

The Prime Minister seems to have been more attentive to the file than was the Minister of Transport; certainly he was better briefed. [Compare, e.g., testimony of Mr. Glen Shortliffe, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:65-66, with the testimony of the Hon. Jean Corbeil, *Committee Transcript*, Wednesday, September 20, 1995, Issue No. 21, 21:24; Memorandum to the Prime Minister from Mr. Shortliffe, dated December 4, 1992, Committee Doc. 002184, with testimony of the Hon. Jean Corbeil, *Committee Transcript*, Wednesday, September 20, 1995, Issue No. 21, 21:24.]

The Prime Minister was advised of the numerous concerns of Transport Canada and others about proceeding with the project in November 1992 -- including "concern with the inequity of the arrangement (over \$1.0 billion in revenue in exchange for only \$150 million in work," and "the negative impact it would have on... the deficit" -- yet the project went forward. **It is notable that the memorandum from Mr. Shortliffe to the Prime Minister of November 16, 1992 does not present a single reason why the project should proceed.** [See: Memorandum to the Prime Minister from Mr. Shortliffe dated November 16, 1992, Committee Doc. 002188.]

The Clerk of the Privy Council, Mr. Glen Shortliffe, held weekly meetings "to keep every one on track." [Memorandum from Mr. Paul Gonu to Mr. Al Clayton, dated May 6, 1993, Committee Doc. 000417.] And he was reporting back to the Prime Minister with detailed up-dates on the status of the negotiations.

The Committee was given written memoranda from Mr. Shortliffe to the Prime Minister documenting briefings given every two weeks, and sometimes more often. When asked about this "truly unbelievable" level of interest displayed by the Privy Council

Office, Mr. David Broadbent agreed: "I can't think of a comparable situation either." [Committee Transcript, Wednesday, August 2, 1995, Issue No 9, 9:109.]

The Committee saw extensive evidence of "strong pressure" on officials to conclude the Pearson agreements by May 31, 1993. [See, eg, Memorandum from Ms. Carole Swan to Mr. Sid Gershberg, dated May 10, 1993, Committee Doc 00272] Memoranda from the Department of Finance noted that "Transport officials have been working at a furious pace to meet the goal of signing final agreements by the end of May." **The officials warned that the insistence on meeting this deadline had its cost: "No doubt, PDC feels it has an upper hand in negotiations."** [Memorandum from Mr. Robert Fonberg to Mr. Michael Francino, dated May 17, 1993, Committee Doc. 002072.]

The pressured pace of the negotiations worried officials: "Within weeks, the government will be bound by the terms of a 57 year lease.... We are concerned that PDC will soon be in a position to charge "monopolistic" fees.... Clearly, if this deal stands, a communications plan should be developed which defends the higher prices and ground rents." [Memorandum from Mr. Robert Fonberg to Mr. Michael Francino, dated May 17, 1993, Committee Doc. 002072, emphasis in original document.]

The Committee learned that this pressure came directly from the Prime Minister; he was determined to get the deal concluded before he relinquished his position to Ms. Campbell. [See, eg, testimony of Mr. Glen Shortliffe, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:74.] Eventually, even Mr. Mulroney had to accept the fact that he could not push the deal through before leaving office. Mr. Shortliffe reported to him that "delays by Paxport and Claridge in clarifying the status of Mergeco have slowed progress on the file." [Memorandum to the Prime Minister dated April 8, 1993, Committee Doc. 002097.]

The file was passed to the Rt. Hon Kim Campbell. She too showed no qualms about intervening to get the deal done before the election in October 1993. Two and a half weeks before the election, when it was well known from the polls that the Conservatives were headed for defeat, she personally directed the Chief Negotiator to proceed with the execution of the agreements.

The Committee saw other evidence of pressure exerted from the Prime Minister's Office. A handwritten memorandum of a meeting on June 14, 1991 with Mr. Richard Lelay, Chief of Staff to then Minister of Transport, the Hon. Jean Corbeil, noted: **"Real issue is delinking: pressure tremendous, PMO down."** [Committee Doc. 000585.] That memo also notes: **"Issue is can dept. put it together so that it doesn't blow up on everyone!!"**

The Prime Minister did not shrink from letting the Clerk of the Privy Council, Mr. Glen Shortliffe, know that he wanted his friends "**to get a piece of the action.**" [Testimony of Mr. Shortliffe, *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:65.] And this is what happened: within a matter of days after the announcement that the Paxport proposal had been selected, Paxport and Claridge were discussing a merger. **And the merger was described in internal Transport documents as "a product of PCO/politicians."** [Meeting Notes of a March 18, 1993 meeting, Committee Doc. 00007.]

Inevitably Mr. Mulroney's activities in a similar lease negotiation in 1988 come to mind, where the Ontario Court of Justice found that several "extraordinary" things occurred⁴²:

"Frustrated by the progress of negotiations, John Bitove Sr. ("Bitove Sr."), the Chairman of Bitove Corporation, did an extraordinary thing. He called a political friend, the then Prime Minister, Brian Mulroney, and sought his intervention in this matter. Not many Canadian citizens have direct access to the Prime Minister and can have his ear over complaints about the pace and course of negotiations with a government department. But 1988 was an election year and Bitove Sr. was a significant fund-raiser for the Conservative Party. It is even more extraordinary that the Prime Minister would become involved in what seemed to be essentially private commercial negotiations. However, as a result of this initiative by Bitove Sr., the Prime Minister contacted Glenn Shortliffe, the Deputy Minister of the Ministry of Transportation and Communications ("Shortliffe") and advised him to resolve the problem. Shortliffe immediately removed the existing negotiating group at Transport Canada." *Canada (Attorney-General) v. Bitove Corp.*, [1995] O.J. No. 2627, Court File No. B31/94A, Ontario Court of Justice, September 14, 1995 (Lederman, J.), para. 50.

In the Pearson case, complaints from Paxport about the pace of negotiations resulted in Mr. Victor Barbeau being removed from his responsibilities as Assistant Deputy Minister, Airports, and sent home on "gardening leave." Indeed, the government team was almost completely different at the end than it was at the beginning: over the life of the deal, Transport Canada went through three Ministers, three Deputy Ministers, and four Chief Negotiators. This resulted in a striking lack of continuity. One is forced to ask whether personnel were changed with a view to finding someone who would make the deal "happen."

⁴² Just as Mr. Shortliffe attempted to downplay the import of Mr. Mulroney's interventions in the Pearson deal, so did he go to great lengths to disagree with the Court's findings in the *Bitove* case. The parallels -- and pattern of behaviour -- remain striking.

An internal Paxport memorandum reported complaints heard from a Transport Canada official "about the political interference in the process. [The official] bemoaned that the government, having made a decision about the future of the terminals, didn't sit back and allow the public servants to get on with the process in an orderly fashion 'just like Terminal 3'." [Memorandum entitled "Coordination with Transport Canada at LBPIA," from Mr. Dale Nankivell to Mr. Jack Matthews, dated April 15, 1993, Committee Doc. 001104.]

That the Minister of Transport flatly overruled advice from his public servants on numerous occasions is well documented -- refusing to call for "expressions of interest," proceeding to issue the RFP without waiting for the results of the environmental assessment review panel on runways, insisting on a 90-day response period for the RFP, and refusing to prepare a "Crown construct" base case scenario for use in assessing the true value to the Crown of the proposals. [See, eg, Memorandum from L.A. McCoomb to V.W. Barbeau dated August 21, 1991, Committee Doc. 001047.]

These interventions did not end with the conclusion of the RFP process. There were a number of issues during the final negotiations on which the consortium made certain demands. Though Transport officials recommended strongly against their acceptance, the Minister directed that the questionable terms be accepted. These included the \$33 million deferral of rent to the government, and the passenger diversion guarantee.

The public servants could only keep notes, to protect themselves from being "hung out to dry." [E-Mail from Mr. Andy Macdonald to Mr. Mel Cappe and three others, dated October 12, 1993, Committee Doc. 002068.] As early as June 17, 1991, internal memoranda were noting: "Paper trail - Min[ister] can overrule us ... but audit trail on decisions." [Memorandum of meeting dated June 17, 1991, Committee Doc. 000585]

Mr. Barbeau, when asked whether the Request for Proposal process for the Terminal 1 and 2 project was unusual, stated:

"Is it unusual? Again, this calls for a value judgment on my part and I can't pronounce myself on that. What is normal, abnormal, usual, unusual, the fact of the matter is we had, as public servants, direction from the government to do things in a certain way, and that's what we did." [Committee Transcript, Tuesday, July 11, 1995, Issue No. 2, 2:69.]

5. Were lobbyists allowed excessive access and influence?

While it is always difficult to specify with any certainty how much lobbying is acceptable, and at what point it becomes excessive, in this case the Committee saw clear evidence of extraordinary influence by those lobbying the Government, and of extraordinary rewards from the private sector to lobbyists -- all costs that would be claimed back, before profit, from Pearson revenues. In particular:

- Mr. Hession conducted a carefully choreographed lobbying assault on everyone who could in any way be helpful or relevant to Paxport winning the Pearson contract. His diaries for 1990 - September, 1993 [the only diaries produced for the Committee] are filled with lunches and dinners at the Rideau Club, Hy's Steak House and the Parliamentary Restaurant, with golf games, as well as dozens of meetings with Cabinet Ministers, their political staff, chiefs of staff to the Prime Minister, as well as persons reputed to be close to Prime Minister Mulroney, persons such as Mr. Sam Wakem (also a law partner of Mr. Gordon Baker, the lawyer for the Matthews Group), the Hon. Guy Charbonneau, and Dr. Fred Doucet, who later himself became a registered lobbyist for Paxport.
- Mr. Hession engaged a team of lobbyists, headed by Mr. Bill Neville, to assist in this campaign. Mr. Neville was also on retainer throughout this period from Air Canada, and then, while still invoicing Paxport for lobbying services, headed Ms. Campbell's transition team, which moved key personnel involved in the Pearson file.
- Mr. Hession recruited Mr. Andy Pascoe to join his team of lobbyists. Mr. Pascoe formerly was the individual on Transport Minister Lewis' staff who was responsible for the Pearson redevelopment file. He saw or had access to all the unsolicited proposals submitted for the Terminal 1 and 2 project. As a representative of the Minister's office, he attended meetings with Paxport's competitors and Transport Canada officials. Thus he had access to extensive confidential information about Paxport's competition and what they would likely be proposing for the Airport, as well as confidential information about the concerns and priorities of Transport Canada. And he joined Paxport just before the RFP issued -- precisely when that information would have been most valuable to Paxport and its principals.
- Paxport lobbyists were able to obtain "full debriefings" of senior Cabinet Committee meetings that impacted directly on the Pearson project. The proceedings of these committees are supposed to be kept secret, for at least 20 years. But Mr. Hession revealed that it was "not uncommon" for Paxport to receive such

information. He seemed genuinely surprised that we thought this extraordinary and shocking -- and his surprise at our reaction itself speaks volumes.

- Paxport entered into two contracts with Dr. Fred Doucet, a long time close personal friend and senior staff member of Prime Minister Mulroney. Those contracts would have paid Dr. Doucet over \$2 million in lobbying fees, and they were contingent on Paxport signing the Pearson contracts.
- Paxport entered into a contract with Mr. Hession to pay him a "post-employment package" of \$83,750 each year for the rest of his life. If he died before his wife, she would receive \$41,875 each year for the rest of her life. This is a generous pension for four years lobbying -- and the money would have come right out of Pearson revenues.

The effectiveness of this lobbying campaign is evident throughout this report. **Paxport lobbied successfully for the Government to ignore the advice of the public servants, and obtained a single-stage process (no expressions of interest); an RFP with a short response period (90 days rather than the recommended 6 months); an RFP in advance of the EARP report; bidder qualifications in the RFP so as to disqualify one of its most serious competitors; emphasis for the "return to the Crown" in evaluating the proposals, and minimal weight for the proponent's qualifications to carry out the proposal, financial or otherwise; and then, when the Deputy Minister refused to direct officials to begin negotiations with Paxport after Deloitte & Touche found they could not finance their proposal, "lobbyists were abuzz" and persuaded the Minister of Transport, in effect, to direct the result.**

We can understand the lobbyists' efforts to represent the interests of their clients forcefully. But we strongly object to the fact that the Government was prepared to change public policy and make new rules in response to these representations, often against the considered judgment of public servants, against good business judgment, and finally, against the best interests of the country. This is **not** the process the Government of Canada should have followed in deciding the fate of Canada's largest airport -- and in negotiating a deal that would last 57 years.

6. Notwithstanding the process, was the final deal in the best interests of Canada?

While it is difficult to dismiss the defects in the process, the final deal must be evaluated objectively, on its merits. Serious questions remain regarding the terms of the final deal. These questions more than justify a decision to cancel the agreements.

The Committee heard undisputed evidence that the Government was relying on out-of-date information when it concluded that the rate of return to the consortium under the final deal was fair and reasonable. For example, Deloitte & Touche's August 17, 1993 report that found the 14% after-tax return was fair and reasonable, was based on "the higher rates in the spring," and had not been updated to reflect the interest rates that were in place when the letter was written. [Testimony of Mr. Allan Crosbie, *Committee Transcript*, Monday, November 6, 1993, 1300-7.]

The Deloitte & Touche report also relied on a Price Waterhouse report when it concluded that an after-tax return of 12 to 14% was reasonable. However, the Price Waterhouse report was referring to a *pre-tax* rate of return of 11 to 13%. And this would have been consistent with other studies, such as that of D.S. Marcil prepared for another Transport Canada study, which found a pre-tax rate of return of 14.5% to be reasonable. [See: Testimony of Mr. Allan Crosbie, *Committee Transcript*, Monday, November 6, 1993, 1300-6-7.]

In fact, the pre-tax rate of return in the Terminal 1 and 2 project was 23.6% -- substantially higher than the rates found to be reasonable in these studies. And even this high figure did not tell the whole story. It did not reflect the numerous side deals from which the members of the consortium were going to enrich themselves.

The non-arms length agreements were of significant concern for several reasons: (1) they added up to millions of dollars of Pearson revenues that were to be skimmed off the top by consortium members; (2) the consortium members were noticeably reluctant to disclose information about these contracts -- officials had to try to piece them together, and fix each one within the complex web of related companies; indeed, Deloitte & Touche reported frankly that they were unable to obtain information about these contracts, and therefore had not reflected their yield in the rate of return; and (3) the Government gave away any effective right to control this self-dealing by consortium members.

Government documents produced for the Committee indicated that "Mergeco is well insulated from any increase in construction costs; as well, there is little incentive for them to save in construction costs." [See: "Comments on Sensitivity Analysis To-Date," May 31, 1993, Committee Doc. 00212.] This is particularly disconcerting when one realizes that

Matthews companies were retained to do the construction. So, Mr. Matthews and company had "little incentive" to exercise restraint or fiscal responsibility in performing the construction services. They would get paid in full for this work (however excessive), plus take home their share of the 23.6% profit return.

And while some of the non-arms length contracts may have been fair and reasonable, others were patently excessive, inappropriate, and would not be acceptable in any usual business transaction.

For example, there was the one-page contract, signed on October 4, 1993, whereby T1T2 Limited Partnership promised to pay \$3.5 million to Matthews Investments 4 Inc. -- a company that does not appear anywhere else in the records, and about which we could find out very little, except that Mr. Don Matthews is the President/Chairperson. This money was labelled a "consulting fee," but it could have been called anything, including a gift: there were no obligations placed on Matthews Investments 4 Inc. to do anything to earn this money. The contract was very clear that it could not be cancelled or terminated for any reason. It could, however, be fully assigned by Matthews Investments 4 Inc., so that Mr. Matthews could assign the \$3.5 million to anyone -- himself, his son, or a particularly helpful friend. Yet this was a contract to be paid out of Pearson revenues, supposedly as part of the redevelopment project.

Other non-arms length contracts included a \$4 million fee to Paxport International, so that Paxport International could promote Canadian airport development expertise and technology internationally. In other words, Pearson Airport was to subsidize Paxport's self-promotion for other contracts in the world market.

In addition, there were contracts to non-arms length parties to serve as a "consultant" in connection with the management, operation and redevelopment of Terminals 1 and 2 -- precisely the services, one would have thought, the consortium was undertaking to provide in exchange for their 23.6% return.

The list goes on and on. (These contracts are enumerated in greater detail in the report's description of evidence.) And the bottom line is clear: millions of dollars of Pearson revenues would have gone to enrich individuals and companies undertaking activities that should not have been paid for by Pearson airport, that is, by the travelling public.

Other aspects of the final deal, too, were not in Canada's best interest. The Government, having accepted Paxport's proposal because it offered the best return to the Crown, promptly agreed to reduce this return, and not just once but twice. First, it agreed to defer \$33 million in rent for the first three years, even though officials warned that there was

"no source of funds" to make up this loss for the Government. [See: Memorandum to Mr. Glen Shortliffe from Mr. Bill Rowat, dated May 25, 1993, Committee Doc. 002194.] Then, the Government agreed to reduce its ground rents by 15%, to enable the consortium to pass these savings on to the airlines, and cushion them from the rent hikes required by the proposal.

Again: the problem of the rent hikes to the airline industry was known and anticipated at the time of the Evaluation Report. It was a problem that would have been avoided by the competing Claridge proposal. So we have a situation where the Government selected a particular proposal because of the high rents promised the Crown; those high rents were dependent on raising the costs to an already-strapped airline industry; and the Government agreed to reduce its rents, to help that industry afford this proposal. **It certainly appears that if the Government was determined to proceed to privatize Terminals 1 and 2, the Government, the airline industry, and the travelling public would have been better off accepting the competing Claridge proposal over the Paxport one from the very beginning.**

Did the Government wilfully ignore market conditions in the airline industry, and the likely impact that would have upon the proposal and the return to the Crown? The Prime Minister had been warned, back on December 4, 1992, that Paxport could learn "in a matter of weeks ... that their proposal is not workable under current circumstances in the airline industry." [See: Memorandum for the Prime Minister from Mr. Glen Shortliffe, dated December 4, 1992, Committee Doc. 002184.] Or, did the Government have another agenda, another reason to select the Paxport proposal?

The Government also agreed -- again, against the strong representations of its officials -- that it would not divert traffic away from Pearson, and it would not allow any airport facility to be developed within a 75-kilometre radius of Pearson, until the volume of passenger traffic at Pearson reached 33 million. The only circumstances in which the Government could take such action would be if it compensated the developers, or allowed it access to Area 4, a section at Pearson that had been specifically excluded from the project.

Public service memoranda warned that the "[p]robability is high that traffic diversions which would drop traffic below the 33 M threshold will be necessary," and that, "Crown's financial exposure would be high (in order of \$100M NPV over 57 years of lease.)" ["Diversion Threshold/Capacity Guarantee," Committee Doc. 002008.]

Thus, the Government continued to insulate the consortium from any risk associated with the development, while cementing its monopoly hold on the southern Ontario airways. Not only would they control the whole of Pearson Airport (including

potentially Area 4), but they had a powerful means to prevent any competition from other airports in the area.

Other issues of concern in the agreements related to the substantial power given the developers to commit "minor breaches" of the agreements. The only remedy given the Crown in the event of a default was to step in and take over the entire airport. This is not the usual remedy clause; large contracts like this usually provide a range of remedies, for use depending on the circumstances. And having extricated themselves from the airport business, the Government would not likely be able to step easily into the breach and return the airport to smooth operation. This fact would have given the consortium considerable leverage in the event it wanted to change certain provisions, or not live up to its full obligations.

In the event the consortium defaulted on its mortgage, and the mortgagee enforced its security by taking over the airport, the Government again was left with little in the way of recourse. It had none of the customary rights to approve a third party assignee of the lease. So that the bank or other security-holder could simply choose to install anyone -- a company with no track record, or a company with no Canadian ownership or base -- and the Government would be unable to prevent it. And the lease was for 57 years.

7. Was it proper for the Government to direct the execution of this controversial deal during the election campaign?

The evidence was absolutely clear that until October 7, 1993, when the final documents were executed, there was no contract between the parties. Indeed, negotiations continued until 24 hours before the Minister of Transport signed certain of the documents, on October 4, 1993 -- only three weeks before election day.

The Committee learned that the general rule of conduct that is observed after Parliament has been dissolved is to act with caution. One "would consider factors such as: Is it a transaction that is going to bind future governments? ... [A]re there alternatives? Are there urgencies in the matter? Is there an obligation to act? Is there controversy?" [Testimony of Jocelyne Bourgon, *Committee Transcript*, Thursday, September 14, 1995, Issue No. 19, 19:100.]

By our constitution, the Executive of the Government is responsible to Parliament, but after the House of Commons has been dissolved, and before another has been elected, there is no Parliament to which to be responsible. As the Committee was told, this fact causes governments to act with "caution" during an election.

Should the Pearson Airport deal have been treated with "caution"? This was a major deal. It was unprecedented. It was binding for 57 years. It was highly controversial.

The argument that it could always be cancelled simply serves to remind us of the fact that when the Chrétien Government did cancel it, suits for hundreds of millions of dollars were launched, which suits now advance through the law courts while Bill C-22, which would limit any recovery to actual costs incurred, is being refused passage by the Progressive Conservative members in the Senate.

Could the making of the contract have been put off until after the election? As far as the public good was concerned, there was no urgency. From the viewpoint of the public, October was no more advantageous than November. Indeed, logic would suggest that the Progressive Conservative Government, out of respect for constitutional practice, would have put off making the contract until November if it had expected to win the election. Logic would suggest that it was the expectation that the Conservatives would lose the election that caused the Government to violate the constitutional practice, and thus to show contempt for the underlying principles of responsible government.

With regard to the violation of this practice in entering into the Pearson Airport Agreements, Professor John Wilson was clear and emphatic. [*Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:45.] He did not mince his words. He characterized Prime Minister Campbell's actions as evincing "a reckless disregard for propriety," and went on: "To say that her decision was a constitutionally inappropriate exercise of power is, in my view, to put it mildly, but in the context of our customs and those of other parliamentary systems it, in my view, is also enough to justify whatever steps have to be taken to terminate the agreement." [*Id.*, 24:15-16.]

The Committee learned that in Australia, there is a written constitutional convention known as the "caretaker convention," which expressly requires a Government "to avoid implementing major policy initiatives, making appointments of significance or entering major contracts or undertakings during the caretaker period [when Parliament has been dissolved and an election is underway] and to avoid involving departmental officers in election activities." [Submission of Professor John Wilson, read at *Committee Transcript*, Monday, September 25, 1995, Issue No. 24, 24:34.]

The Committee heard strong evidence that, historically, the Canadian Government has in practice observed these same principles. We believe that the Government of Canada should give serious consideration to expressly adopting this Australian convention as a convention to guide and bind the actions of a government during an election period.

Conclusion

It was apparent throughout these hearings that the Conservative majority on this Committee was focusing, almost to the exclusion of everything else, on the Nixon report. They set out to establish that the Nixon Report was less accurate or complete than it might have been. Their hope was that by doing so, they would then be able to draw the conclusion that the Pearson Airport Agreements should not have been cancelled.

The strategy of the Conservative majority on the Committee did not work. In fact, the study by the Committee has shown the reverse to be true.

The evidence brought before the Committee, as described in this Report, has demonstrated that this was a bad deal for Canada, brought about by a process that was seriously flawed from beginning to end. With or without a Nixon Report, the Prime Minister was clearly justified in cancelling the Pearson Airport Agreements, because these agreements were not in the best interests of Canadian taxpayers and the air travelling public.

The terms of the deals could not be allowed to stand. There is no justification for an agreement that gave developers not only an exorbitant rate of return, but also millions of extra dollars through sweetheart side deals, at the expense of the Government, which agreed to reduce its own revenue not just once but twice -- and that at a time when government spending was being severely reduced, and all Canadians were being asked to accept less in government support.

The Canadian public knew this deal was wrong. They spoke with great eloquence at the ballot box, particularly those Canadians living in Ontario. This inquiry has only confirmed what the electorate knew: this deal had to be cancelled, so that Pearson Airport's needs could properly be addressed, in a manner appropriate and consistent with the public interest.

The Power to Send for Persons, Papers and Records: Theory, Practice and Problems (Report of the Chairman and the Deputy-Chairman)¹

On May 4th, 1995, the Special Senate Committee on the Pearson Airport Agreements was established. The mandate of the Committee was to examine and report upon all matters concerning the policies and negotiations leading up to, and including, the agreements respecting the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport and the circumstances relating to the cancellation of the agreements.

One of the powers given to the Pearson Special Committee by the Senate was the "power to send for persons, papers and records".² This power is central to the ability of the Committee to discharge its responsibility of conducting a complete and thorough inquiry into Pearson agreements. Without access to all relevant information, the Committee simply would not be able to carry out the mandate it had been given by the Senate.

Part One of this paper examines the nature and scope of the powers of parliamentary committees and the manner in which those powers have traditionally been exercised. Part Two provides an overview of the process whereby documents were made available to the Pearson Committee. The categories of information that were withheld from the Committee and the reasons given by government officials for doing so are also reviewed. The last part of the paper examines the frustrations and difficulties encountered by the Pearson Committee in its efforts to obtain full disclosure of all relevant information and concludes with a list of recommendations.

This paper is prepared in the hope that members of future parliamentary committees will benefit from the experiences of the Pearson Committee and that a better understanding and a greater measure of respect for the powers of parliamentary committees will be achieved in the future.

¹ The conclusions and recommendations of this Report does not necessarily reflect the views of all Members of the Special Committee.

² *Minutes of the Proceedings of the Senate*, May 4, 1995, at 930.

Part One: The Theory

The right of the Senate and the House of Commons to institute inquiries is fundamental to the parliamentary committee process. This right forms an integral part of the *lex parliamenti* or law of Parliament. As Diane Davidson, general legal counsel for the House of Commons, observes, parliamentary committees are empowered by either the House and/or the Senate: "to examine and inquire into matters referred to them on behalf of the respective Houses, where it would, for obvious reasons, be impractical for the parent bodies themselves to operate".³ Parliamentary committees are thus an extension of either the House of Commons or the Senate and enjoy the same extensive privileges, immunities and powers given to the two Houses and its members⁴ under the constitution⁵ and the *Parliament of Canada Act*⁶.

³ "Presentation of General Legal Counsel to the Standing Joint Committee for the Scrutiny of Regulations on the Powers of Parliamentary Committees" (Ottawa: House of Commons, 16 November, 1994) at 1; reproduced as "The Powers of Parliamentary Committees", *Canadian Parliamentary Review*, Spring 1995.

⁴ Special Senate committees, such as the Pearson Committee, do not automatically enjoy the same broad powers of Senate standing committees. Pursuant to Rule 94 of the *Rules of the Senate of Canada*, July 1993, the Senate, when appointing a special committee, indicates the powers to be exercised and the duties to be undertaken by the special committee. For a list of the powers given to the Pearson Committee, see *Minutes of the Proceedings of the Senate*, May 4th, 1995 at 929-30.

⁵ Section 18 of the *Constitution Act, 1867* states:

The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

⁶ Section 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, states:

The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise

- (a) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1876*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and
- (b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

The powers of standing committees are set out in Rule 91 of the *Senate Rules*⁷ and in Standing Order 108(1) of the House of Commons⁸. Ms. Davidson comments on the importance of these two provisions which:

... include the innocuously-stated authority to "send for persons, papers and records." No distinctions are made between different types of documents or categories of witnesses. The very simplicity of the words granting this authority would appear to belie the strength of the power thereby delegated. When coupled with the rights a committee enjoys as a constituent part of Parliament these are very full powers indeed.

What these grants of power mean, of course, is that, provided a committee's inquiry is related to a subject-matter within Parliament's competence and is also within the committee's own orders of reference, Committees have *virtually unlimited powers to compel the attendance of witnesses and to order the production of documents.* (emphasis added)⁹

Support for this position can be found in a ruling made by the Speaker of the House of Commons in March, 1987:

I think it is important to emphasize, in case there should be any misconception in any quarter concerning the powers and functions of parliamentary committees, that committees appointed by this House are entitled to exercise all or any of the powers that this House delegates to them. ... The powers of standing committees to initiate investigations have recently been extended in the spirit of parliamentary reform. ... The scope of operations of standing committees has thus been considerably widened and the power to summon public servants as witnesses is essential to the effective

⁷ Rule 91 states:

A standing committee shall be empowered to inquire into and report upon such matters as are referred to it from time to time by the Senate, and shall be authorized to send for persons, papers and records, whenever required, and to print from day to day such papers and evidence as may be ordered by it.

⁸ Standing Order 108.(1)(a) states:

Standing committees shall be severally empowered to examine and enquire into all such matters as may be referred to them by the House, to report from time to time and to print a brief appendix to any report, after the signature of the Chairman, containing such opinions or recommendations, dissenting from the report of supplementary to it, as may be proposed by committee members, and except when the House otherwise orders, to send for persons, papers and records, to sit while the House is sitting, to sit during periods when the House stands adjourned, to sit jointly with other standing committees, to print from day to day such papers and evidence as may be ordered by them, and to delegate to subcommittees all or any of their powers except the power to report directly to the House.

⁹ *Supra*, note 2 at 2.

performance of their tasks. It can be expected that *this power will be used more, not less, frequently in the future*, and I think it is salutary to alert all those concerned to this fact of parliamentary life. (emphasis added)¹⁰

A witness appearing before a parliamentary committee is bound to answer all questions put to him or her and cannot be excused on such grounds as solicitor-client privilege, an oath not to disclose information has been given, or responding would risk self-incrimination. A witness, however, may appeal to the chair and give reasons as to why the information requested should not be disclosed.¹¹ In such circumstances, committees will often endeavour to strike a compromise whereby the desired information is obtained in a manner that still respects the concerns of the witness. An example of such a compromise would be to consider the desired information *in camera*. In the final analysis, however, "witnesses must rely on the collective common sense of the members of the committee and their good graces".¹²

Where a committee's request for documents is refused and the committee, after having reviewed the reasons given for the refusal, still insists on disclosure, the committee may report the matter to the Senate or the House. Final determination as to if and how an order for production is to be enforced is left up to the Senate or the House itself.¹³

¹⁰ *House of Commons Debates*, March 17, 1987, at 4265. Attached as an appendix to Ms. Davidson's Presentation to the Standing Joint Committee Scrutiny of Regulations on November 16, 1994, *supra*, note 2.

¹¹ Charles Gordon (ed.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, (20th ed.) (London: Butterworths, 1991) at 746-747.

¹² Joseph Maingot, *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982) at 163.

¹³ Arthur Beauchesne, *Beauchesne's Parliamentary Rules & Forms*, (Toronto: Carswell, 1989). Citation 848 reads:

- 1) Committees may send for any papers that are relevant to their Orders of Reference. Within this restriction, it appears that the power of the committee to send for papers is unlimited.
- (2) The procedure for obtaining papers is for the committee to adopt a motion ordering the required person or organization to produce them. If this Order is not complied with, the committee may report the matter to the House, stating their difficulties in obtaining the requested documents. It is then for the house to decide what action is to be taken.
- (3) It cannot, however, be said that this requirement is absolute either in the case of government departments or of public or private bodies, since there are no instances recorded in which obedience to an Order for papers has been insisted on.

It is not clear to what extent the *Charter* may have restricted the privileges, immunities and powers of the Houses of Parliament. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, the issue arose whether a general prohibition on the use of television cameras in the Nova Scotia House of Assembly was in contravention of s. 2(b) (freedom of the press) of the *Charter*. The Supreme Court of Canada held that the *Charter* does not apply to the members of a legislative assembly when they exercise their inherent privileges. Madam Justice McLachlin remarked:

In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege

Although in theory the powers of parliamentary committees are clear, as the rest of this paper will reveal, attempts to obtain disclosure of information from the Government can prove to be an uphill battle. As Joseph Maingot recently remarked:

The acknowledged powers of committees to call for persons, papers and records had always been a question of some nicety as it related to persons or institutions that were responsible to a Minister of the Crown, at least in Canada. This has always been a "grey" area in practice, albeit clear in theory. However there simply has not been any serious attempt to press the matter until recent times.¹⁴

Part Two: The Process

The Senate put before the Committee a very demanding and onerous task. It was necessary for the Committee to inquire into events that occurred over a period of approximately six years. These events involved numerous discussions and deliberations over policy issues by several government departments as well as a complex and detailed set of negotiations between the Government and the private sector in relation to one of Canada's most valuable assets.

Undaunted, the Committee set for itself an aggressive timetable for the completion of its inquiry. The Committee was established on May 4, 1995. In early June, the Committee resolved to commence its hearings in early July. It is estimated that there are approximately 200,000 pages of documents in government files relating to the Pearson Agreements.

Gathering and Organizing the Documents

The Department of Justice was given the responsibility for making government documents available to the Committee. To assist them in this massive undertaking, the Department of Justice retained the services of the law firm of Scott & Aylen. The role of Scott & Aylen was twofold. First, the relevant documents had to be gathered in one place and organized according to the witnesses who were scheduled to appear before the Committee. Scott & Aylen retained the services of a firm of forensic accountants, Lindquist Avey, to assist them in this task. Second, Scott & Aylen reviewed the relevant documentation with government and non-government witnesses in order to prepare them for their appearance before the Committee.

claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege. (at 384)

In this case, the Court ruled that the House's right to exclude strangers was necessary for the proper functioning of the legislative assembly. Certain parliamentary powers, however, such as the power of a parliamentary committee to summon witnesses and for the Houses to take action to compel the witness to appear, may not pass the threshold test of 'necessity' and consequently, can be subject to *Charter* challenge.

¹⁴ Presentation by the House of Commons Standing Committee on Privileges and Elections to the House of Commons, attached as Appendix 3 to the Committee's First Report to the House, May 27, 1991.

The following is an outline of the process that was followed in making documents available to the Committee:

- All relevant government departments were asked to identify any documents that might be of potential interest to the Committee;
- Copies of all the documents were made and delivered to Lindquist Avey on June 13th, 1993;
- Lindquist Avey created a data base so that relevant documents could be recalled on a subject matter and potential witness basis;
- As witnesses were identified and the order of their appearance before the Committee became known, Lindquist Avey personnel gathered together those documents authored or received by the witness or that were otherwise relevant;
- A team of public servants from the Department of Justice and the Privy Council Office reviewed the documents; material relating to cabinet confidences, matters of personal or commercial privacy, advice to ministers and documents protected by solicitor-client privilege were removed and the expurgated documents were then sent back to Lindquist Avey;
- The expurgated documents were placed in binders, an index for each binder was prepared, and the documents were sent to the Clerk of the Committee who made them available to Committee members.

A total of 103 volumes of documents were delivered to the Committee, a volume typically containing approximately 350 pages.

The Vetting Process

In deciding which information was to be withheld from the Committee, officials from the Department of Justice and the Privy Council Office followed the principles embodied in the *Access to Information Act*.¹⁵ Although this Act is not applicable to parliamentary committees requesting information, George Thomson, Deputy Minister of the Department of Justice, testified before the Committee that the principles traditionally followed by the Government in deciding what information to make available to parliamentary committees are the same as those set out in the Act.¹⁶

¹⁵ R.S.C. 1985, c. A-1

¹⁶ *Proceedings of the Special Senate Committee on the Pearson Airport Agreements*, September 21, 1995, at 22:85:

Mr. Nelligan: ... Is it your view that this committee is limited to the material which would be given to an ordinary citizen under the Access to Information Act?

Mr. Thomson: No. It's my understanding that the - they are not limited to only the material provided under the

When passages in a document were excised, a section of the *Access to Information Act* was cited so as to communicate some understanding of the type of information that was being protected. The following is a list of sections of the *Access to Information Act* commonly cited by the government censors:

Section 19	Personal Information
Section 20	Third Party Confidential Commercial Information
Section 21	Advice to a Minister
Section 23	Solicitor-Client Privilege
Section 69	Cabinet Confidences

A discussion of each category of confidential information follows beginning with those areas considered to be the most sensitive.

1. Cabinet Confidences

The importance of cabinet confidentiality is well-established in the British and Canadian parliamentary systems. A list of documents that are typically considered cabinet confidences can be found in s. 69 of the *Access to Information Act*.¹⁷

Ms. Margaret Bloodworth, Deputy Clerk and Counsel to the Privy Council Office, explained to the Committee the rationale for protecting cabinet confidences:

Cabinet is the forum in which ministers reach consensus on actions that individual ones of them may take. Providing a forum in which ministers are free to express their individual opinions to their cabinet colleagues, vigorously debate issues and

Access to Information Act. However, the principles that are reflected in the Access to Information Act are in accordance with the practice that I talked about earlier that is followed.

¹⁷ Subsection 69(1) states:

This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

- (a) memoranda the purpose of which is to present proposals or recommendations to Council;
- (b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
- (c) agenda of Council or records recording deliberations or decisions of Council;
- (d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);
- (f) draft legislation; and
- (g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

come to a consensus on how to proceed, ensures that the full range of views can be taken into account before any decision is arrived at. It also ensures that ministers can collectively support all decisions taken and answer for them before Parliament.

The collective decision-making of ministers in cabinet is the key process for ensuring solidarity among ministers and their ability to retain the confidence of Parliament to which they are collectively responsible. If ministers are to be able to make decisions collectively, the privacy of their opinions and views relative to the evolution of government policy must be protected. If these opinions were made known before or after the decisions were taken, it would be difficult to maintain the solidarity and consensus among ministers which is essential to cabinet government.¹⁸

2. Advice to Ministers

Advice to ministers with regard to issues that are considered by cabinet falls within the category of cabinet confidences. However, public servants may also give advice to a minister on a matter that an individual minister can deal with without going to cabinet. Section 21 of the *Access to Information Act* defines the parameters of this category.¹⁹

Ms. Bloodworth testified that this type of information is kept confidential "in order to ensure that public servants provide full and frank advice and that ministers remain accountable and responsible for the ultimate decision, not public servants".²⁰

¹⁸ *Supra*, note 15 at 22:7.

¹⁹ 21.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

- (a) advice or recommendations developed by or for a government institution or a minister of the Crown,
- (b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,
- (c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or
- (d) plans relating the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

²⁰ *Supra*, note 15, at 22:8. Ms. Bloodworth commented further:

Now, section 21 ... provides for a discretionary ability to withhold not just advice provided directly to a minister but advice developed broadly within a government institution. It is however, discretionary. It is not a mandatory exemption and discretion has to be approached.

In this particular case, in view of the task of this committee, and in interests of providing as much information as possible, the principle that was followed, however, was that only advice provided to ministers would be protected, not advice that was provided throughout the department or departments involved.

3. Solicitor-Client Privilege

Advice that a government department receives from its counsel is subject to solicitor-client privilege and the Government will not disclose that information unless the client (the government department) waives the privilege. The rationale for the privilege was briefly explained by Mr. Thomson:

Often when giving legal advice, very hard and complex decisions are called for involving judgments as to trade-offs and possible options. To disclose legal advice in such circumstances can run the risk of producing a chilling effect on full and frank discussion between a client, or a client-department in this case, and their lawyers. In addition, such disclosures can have serious implications with respect to present and future litigation before the courts.²¹

4. Business Confidences

Consents were obtained from the major private sector companies involved in the Pearson transaction to release confidential business information relating to the negotiations and conclusion of the Pearson agreements. Where consent had not been obtained, this information was not provided.²²

5. Personal Information

The rationale for keeping personal information is self-evident. Personal information is defined in section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21.

²¹ *Proceedings of the Special Senate Committee on the Pearson Airport Agreements*, Thursday, September 21, 1995 at 22:10.

²² The relevant section of the *Access to Information Act* states:

Third Party Information

20.(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
- (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
- (d) information the disclosure of which could be expected to interfere with contractual or other negotiations of a third party.

Part Three: The Difficulties

1. Information Initially Not Available In A Timely Fashion

In the early stages of the hearings, committee members were frustrated by the fact that they were given very little time to review the documents. On one or two occasions, voluminous documents were released less than a day before the appearance of the witness. Given the tight timetable, the enormous set of documents that needed to be organized and reviewed, and the large number of government and non-government people involved in the document disclosure process, it is perhaps not surprising that this problem arose. Much more disturbing is an incident that occurred just prior to the completion of the hearings.

In early September, the Committee was advised that there remained a number of documents that had not yet been released because they did not relate to a witness who testified or were outside the time frame or subject area of the witness' anticipated evidence. The Justice Department further indicated that the documents were currently being reviewed and would be released in the near future. No mention was made again of these documents until they were delivered to the Clerk's office at 4:00 pm on Friday, November 3rd. The last day of hearings was scheduled for the following Monday.

The release of these documents at the eleventh hour was highly disconcerting. Justice officials made no effort to give the Committee advance notice that these documents were about to be released. Moreover, Committee members were very disturbed to discover that a number of the documents were highly relevant and related directly to the evidence already given by earlier witnesses. The explanation offered by the Justice Department was that these particular documents were simply overlooked during the initial review.

In August, the Committee was informed that there still remained a large number of undisclosed, non-confidential documents. In the opinion of the Justice Department, these documents would not be of interest to the Committee. Justice officials agreed to produce a master list of these documents. On November 16, 1995, four months after the inquiry was commenced and after the Committee had completed its hearings, the master list of 6,015 documents was provided to counsel.

2. Refusal of Public Servant Witnesses to Answer Questions

A second difficulty that arose during the opening days of the inquiry was the refusal of some key senior federal public servants to answer directly questions put to them by committee members. The officials claimed special status on the grounds of ministerial confidences and their public service oath of secrecy.

Reference was made to a set of Privy Council guidelines entitled "Notes And Responsibilities of Public Servants In Relation To Parliamentary Committees".²³ Under the heading "Answers to Questions put by Committee", the following advice is given:

Witnesses testifying before Parliamentary committees are expected to answer all questions put by the committee. However, additional considerations come to bear in the case of public servants, since they appear *on behalf of the Minister*.

Public servants have a general duty, as well as a specific legal responsibility, to hold in confidence the information that may come into their possession in the course of their duties. ...

In the most general terms ... public servants have an obligation to behave in a manner that allows Ministers to maintain full confidence in the loyalty and trustworthiness of those who serve them. ... If they violate that trust on the grounds that they have a higher obligation to Parliament, then they undermine *the fundamental principle of responsible government, namely that it is Ministers and not public servants who are accountable to the House of Commons for what is done by the Government*. (emphasis in original)²⁴

It is submitted that this position is inconsistent with the views expressed in Part One of this paper. Erskine May, for instance, explicitly states that:

A witness is, however, bound to answer all questions which the committee sees fit to put, and cannot be excused, for example, on the ground that ...an oath has been taken not to disclose the matter under consideration ...²⁵

Similarly, Joseph Maingot claims that:

A witness must answer all questions put to him, subject only to points of order by a member, with the right of the chairman to make a ruling.²⁶

²³ Privy Council Office, December, 1990.

²⁴ *Ibid.*, at 3.

²⁵ *Supra*, note 10; reproduced in Beauchesne, *supra*, note 12, citation 863.

²⁶ *Parliamentary Privilege in Canada*, (Toronto: Butterworths, 1982) at 163.

The Committee, however, decided not to press the witnesses for the desired information since Mr. Jean Corbeil, the former Minister of Transport, was scheduled to appear and the necessary information could be obtained at that time.²⁷

3. The Swearing of Public Servants

The Committee had the power to examine witnesses under oath. Prior to the commencement of the hearings, it had been suggested that requiring witnesses to be sworn was unnecessary because all witnesses testifying before parliamentary committees are expected to tell the truth and inappropriate because requiring sworn testimony would judicialize the hearings and foster an atmosphere of mistrust and confrontation. Traditionally, it has not been customary for public servants appearing before Canadian parliamentary committees to be sworn.

Nevertheless, the Committee elected to exercise its power and have witnesses sworn. The reason for doing so was to impress upon the witnesses appearing before the Committee the seriousness of the inquiry. Recognizing that many of the public statements that had been made about the Pearson Agreements were based on opinion, innuendo and suspicion, the Committee was determined to get at the facts. It was hoped that testifying under oath would encourage witnesses to be forthcoming and to give serious thought to the matters being discussed. Where opinions were expressed, witnesses would be expected to present evidence to substantiate those opinions.

Concerns were expressed that requiring public servants to testify under oath could place them in a position of conflict between the oath to tell the "whole truth" and their duty of confidentiality to their Minister. One senior public servant, for instance, agreed to be sworn but added the following condition: "consistent with my oath of office".²⁸

It was the Committee's view that there is no conflict between a public servant's oath not to disclose ministerial confidences and an oath to tell the whole truth. The latter simply requires witnesses to give truthful and complete evidence on those matters which statutory rules and accepted conventions and practices permit the witness to testify about.

²⁷ Prior to the commencement of the hearings, it was anticipated that some witnesses might refuse to answer questions. At the Organization Meeting of June 8, 1995, the Chair and Deputy Chair adopted the following motion:

... witnesses will be denied any request to testify *in camera*. If after taking the Oath a witness refuses to testify or to answer questions, his or her reasons will be accepted. However, if such should occur, the committee may question their reasons for refusal.

²⁸ Harry Swain, Deputy Minister, Industry Canada, *Proceedings of the Special Senate Committee on Pearson Airport Agreements*, Thursday, July 27, 1995 at 7:4-5.

4. Inconsistent and Excessive Editing of Documents

It was acknowledged by Mr. Thomson, Deputy Minister of Justice, that the document disclosure process was not perfect.²⁹ At times, the process was not inclusive enough. Confidential handwritten notes on the bottom of memoranda from the Clerk of the Privy Council to the Prime Minister, for example, were inadvertently disclosed. On two occasions, uncensored documents were accidentally released from the office of the Minister of Justice to senators' assistants. At other times, documents that were censored were made available elsewhere uncensored.

More significantly, however, was the degree to which the documents were vetted and the absence of a mechanism whereby the committee could satisfy itself that information was being properly withheld. On one occasion, for instance, committee members were surprised by the number of deletions under section 23 (solicitor-client privilege) of a relatively innocent memo of a meeting in the Department of Transport. When a complete copy of the document was finally obtained, it was discovered that what was withheld was not lawyer's opinions, but only lawyers' names!

This example underscores the problem faced by the committee. When a document contains a deletion with a bold statement, such as "s. 23", the committee had no way to satisfy itself that the information was properly withheld.

As a possible solution, it was proposed that counsel to the Committee, after taking an oath of confidentiality, have an opportunity to review the uncensored government documents so as to ensure that the appropriate principles had been applied properly. Reference was made to the fact that other non-government people - Scott & Aylen, Lindquist Avey, and Mr. Nixon - were allowed to review confidential documents after having taken an oath of confidentiality.

The proposal, however, was rejected on the grounds that counsel to the Committee was not an agent of the Government unlike the others mentioned above.³⁰

²⁹ *Supra*, note 15, at 22:12.

³⁰ Both Ms. Bloodworth and Mr. Thomson in their testimony before the Committee addressed this issue: *supra*, note 15, at 22:74; 22:87, 90.

Ms Bloodworth: Mr. Nelligan, unlike those other people, is part of this committee, not part of the government as I've described it. Particularly when it comes to cabinet confidences, the very people that you are protecting cabinet confidences on behalf of ministers and former ministers from, are from the other partisan parts of our system, including legislative branches. So Mr. Nelligan is in a very different position from Mr. Nixon or Scott & Aylen in the sense that he is counsel to this committee, not part of the government. ...

Mr. Nelligan: All right. Assuming [that committees have] broad legal authority, would it not be necessary for them to have at least some assistance from witnesses and from departmental documents to determine whether they should exercise that strong power, and isn't there some way that the department and witnesses can then help them to come to valid public decisions as to whether that information should be put on the public record? ...

All I'm asking for is some help as to how we can resolve these impasses without having to have it all exposed in public. Is there not some way that someone could review these matters to determine whether it's of sufficient importance and advise the committee as to whether they should insist on their legal powers? ...

5. The Application of Solicitor-Client Privilege

On a number of occasions, information was withheld from the Committee on the basis of solicitor-client privilege. Solicitor-client privilege is not opposable to the power of a committee to obtain information.³¹

Mr. Thomson, however, testified that the following principles should be followed with respect to claims of solicitor-client privilege:

- i. The privilege belongs to the client, not the lawyer, and accordingly, the client may waive it.
- ii. Even if the privilege does apply and the client refuses to waive it, the committee ultimately has the right to require that the information be disclosed.
- iii. Committees should rarely exercise that right because of the chilling effect the disclosure of privileged information will have on the solicitor-client relationship and because of the implications that can arise in relation to external litigation. Justice lawyers should be given an opportunity to make representations as to why the information should not be disclosed.
- iv. In circumstances where the committee insists upon disclosure and the client refuses to waive the privilege, discussions should take place as to how the information might be put before the committee in a manner that is least damaging to the client and the solicitor-client relationship.
- v. In cases where an agreement cannot be reached, the Committee can ultimately refer the matter to the Senate or the House for final determination.

In response to a request by the Committee to have Department of Justice lawyers appear before the Committee to testify with respect to legal advice they gave or may have given relating to when the Government was legally bound by the Pearson agreement, Mr. Thomson expressed strong

Mr. Thomson: ... Mr. Nelligan, you are raising I think a valid point, which is when we see this claim being made, we like to have some sense of why it's being made in the particular case. And obviously my concern is that that not be done in a way that ends up just disclosing the information itself. In this particular case, I think what we've been doing is to try to deal with it on an individual basis when a particular case comes up where you have concerns or questions.

I think you raise a good question, and I think there might be some value in us exploring it. We're talking about how this might be dealt with in future cases, exploring whether it's possible to be a little clearer about why the particular claim is being made, so one at least has a sense of the rationale for it without disclosing the information itself, and whether that might be done in a way that goes beyond simply the section of the act itself. We've not done that ...

³¹ See Erskine May, *supra*, note 10:

A witness is, however, bound to answer all questions which the committee sees fit to put, and cannot be excused, for example, ... because the matter was a privileged communication such as that between a solicitor and a client
...

reluctance. Mr. Thomson argued that the Committee already had the views of the Government's chief negotiator on this issue and, given the fact that no legal advice was actually given, it was not the appropriate role for Justice lawyers to give legal opinions to a parliamentary committee as to what might have been the liability of the Government if an opinion had been requested.

After two invitations to appear were declined, the Committee summoned the witnesses. The justice officials, claiming that they were appearing "voluntarily", agreed to testify as to what advice was given but not what advice might have been given if asked.

6. The Failure Of The Committee To Obtain Key Treasury Board Documents

The last and certainly one of the most frustrating problems encountered by the Committee relates to its unsuccessful attempts to obtain disclosure of some highly relevant Treasury Board documents.

In August 1993, Treasury Board was asked to give its approval for the Minister of Transport to conclude the Pearson agreements. To assist in its deliberations, documents containing internal government advice and analysis, including a review of the potential dangers and risks associated with the Pearson agreements, were submitted to Treasury Board.

Ms. Bloodworth testified that these Treasury Board submissions are confidential cabinet documents of the Campbell government. There exists, she explained, in Canada a well-established convention, respected by successive governments, that a newly elected administration may not have access to the confidential cabinet documents of previous governments. When a change of government occurs, cabinet records are left in the custody of the Clerk of the Privy Council.³²

Contrary to this alleged convention, the August 1993 Treasury Board submissions were released to Mr. Nixon, ostensibly in error, shortly after he was appointed by Mr. Chretien to conduct a review of the Pearson agreements. When Mr. Nixon and his staff appeared before the Committee, it was discovered that not only had they reviewed these documents, they had relied heavily on various parts of them for sections of their final report. Mr. Stephen Goudge, Mr. Nixon's legal advisor, testified as follows:

Did I derive support for some of the things in the Treasury Board's submissions? Absolutely yes, absolutely yes. I mean I did; there is no question about it. When I put forward my memorandum to Mr. Nixon, parts of it relied heavily on what was in the Treasury Board submission.³³

³² Supra, note 15 at 22:7.

³³ Proceedings of the Special Senate Committee of the Senate on the Pearson Airport Agreements, Thursday, September 28, 1995 at 27:5-6.

The release of the Treasury Board submissions to Mr. Nixon underscores the fact that materials of this nature are not commonly regarded as cabinet records. So-called cabinet records consisting of reports containing background analysis and discussion should be made available to a parliamentary committee, particularly in this case, where they were given to Mr. Nixon and influenced his decision.

In addition to citing the rules relating to cabinet confidentiality, Privy Council officials also indicated that the release of these documents without the authorization of former Prime Minister Kim Campbell would constitute a violation of the convention restricting access to the confidential papers of previous ministries. It is our belief that the practice of refusing access to members of the incoming government to the papers of previous governments applies, and should only apply, to politically sensitive, inner cabinet records. The Treasury Board submissions sought by the Committee clearly do not fall within this narrow category.

To complicate matters further, the Treasury Board documents were leaked to a reporter, Greg Weston, at the *Ottawa Citizen* in September, 1993. On September 25th and 26th, 1993, two articles appeared in the *Ottawa Citizen* in which Mr. Weston relied heavily upon the information contained in the Treasury Board submissions to harshly criticize the Pearson agreements.³⁴ More recently, on September 25th, 1995, Mr. Weston wrote another column claiming that the Senate inquiry into the Pearson agreements was a waste of time and money because, without the Treasury Board submissions, the Committee did not have the full picture.³⁵

In response, the Committee twice invited Mr. Weston to appear and to make the Treasury Board documents available. The managing editor, on behalf of Mr. Weston, declined the Committee's invitations, on the basis that the Committee should seek access to the documents from the Government. When it was pointed out to the managing editor that the Committee has no way of knowing exactly what documents Mr. Weston has in his possession and was relying upon to cast suspicion over the Committee's inquiry, the newspaper agreed to publish an additional article outlining exactly what documents Mr. Weston possesses.³⁶

The Committee then proceeded to issue a report to the Senate asking that an address be made to the Governor General requesting that the Treasury Board submissions be made available to the Committee. The procedure for an address to the Governor General requesting the disclosure of documents finds its authority in Rule 133 of the *Rules of the Senate*.³⁷

³⁴ Greg Weston, "Tories ignored warnings of airport costs", *The Ottawa Citizen*, September 25, 1993 at A1 and Greg Weston, "Privatizing Pearson: The anatomy of a deal", *The Ottawa Citizen*, September 26, 1993 at A1.

³⁵ "Pearson inquiry whitewash spreads beyond deleting details", *The Ottawa Citizen*, September 25, 1995 at A2.

³⁶ See Greg Weston, "Dear senators: Below please find a road map to lost Pearson papers", *The Ottawa Citizen*, October 12, 1995 at A2.

³⁷ Rule 133 states:

According to the *Manual of Official Procedure of the Government of Canada*, the confidentiality of the advice contained in cabinet documents belongs to the Governor General and it is within his or her prerogative to release the documents:

Disclosure of Cabinet records is regulated by the Privy Councillor's oath and by the concept that Cabinet decisions are advice to the Sovereign which may only be revealed with his consent. Permission is sought through the Prime Minister who may recommend to the Governor General that it be granted, limited or refused.³⁸

This matter is currently before the Senate.

When the royal prerogative is concerned in any account or paper, an address shall be presented to the Governor General praying that the same may be laid before the Senate.

³⁸ Privy Council Office, 1968, Article 9 under the heading "Cabinet Records" at 27.

Recommendations

1. Improved Co-operation From The Department of Justice

Despite claims from government officials that every effort was made to release documents as quickly as possible, we believe that there remains considerable room for improvement in the documents disclosure process. The abrupt disclosure of relevant documents, for instance, just prior to the last day of hearings and more than four months after the hearings had commenced, was, in our opinion, unacceptable. Moreover, the failure to provide before the end of the hearings a list of non-confidential documents that had not been disclosed is indicative of the general reluctance of the Department of Justice to release information³⁹ and the need for improved co-operation.

We recommend that the Special Joint Parliamentary Committee referred to in Recommendation 5 be asked to work with Justice Department officials to establish rules for the handling of documents in future inquiries.

2. Excessive Application of Solicitor-Client Privilege

It became obvious from the number and location of deletions in the documents made on the basis of solicitor-client privilege that the Justice Department's application of this privilege was clearly excessive.

We are in strong agreement with the views expressed by the Information Commissioner of Canada:

Most legal opinions, however stale, general or uncontroversial, are jealously kept secret. In the spirit of openness, the government's vast storehouse of legal opinions on every conceivable subject should be made available to interested members of the public.

Tax dollars [are] paid for these opinions and, unless an injury to the conduct of government affairs could be reasonably be said to result from disclosure, legal opinions should be disclosed.⁴⁰

³⁹ It is interesting to note that lawyers appearing before the Somali inquiry have complained about heavy-handed attempts by Justice officials to restrict access to potential witnesses: "Somalia inquiry lawyers reject Justice demands", *The Globe and Mail*, November 1, 1995 at A11. A letter from the Justice Department to all parties with standing before the inquiry essentially asserted that notice must be given to Justice officials before current or former civil servants or military personnel are contacted. Concern was expressed by Mr. Justice Gilles Letourneau, the Federal Court judge chairing the inquiry, that the letter would intimidate potential witnesses from coming forward.

⁴⁰ *Annual Report 1993-1994*, Information Commissioner of Canada, (Ottawa: Minister of Supply and Services Canada, 1994) at 30.

We recommend that Parliamentary Committees be given the right of access to legal opinions prepared by Justice Department staff unless those opinions would jeopardize the government's position in an issue which is before, or is likely to come before, the courts. The precise rules governing access to legal opinions should be developed by the Special Joint Parliamentary Committee referred to in Recommendation 5.

3. Narrowing the Interpretation of Cabinet Confidences

Throughout the hearing, members of the Committee made a conscious effort to respect cabinet confidences. However, we question whether the principle of cabinet confidentiality was being interpreted too broadly by government officials.

In 1986, the House of Commons Standing Committee on Justice and Solicitor-General issued a unanimous report entitled *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. After reviewing the reasons for keeping cabinet records confidential, the committee remarked:

Nevertheless, the Committee does not believe that the background materials containing factual information submitted to Cabinet should enjoy blanket exclusion from the ambit of the Acts (Privacy and Access). It is vital that subjective policy advice be severed from factual material found in Cabinet memoranda ... [But] factual material should generally be available under the Act ...⁴¹

We strenuously disagree with the reasons given by the Privy Council Office as to why the Treasury Board submissions discussed earlier should not be disclosed to the Committee. It has to be remembered that these documents merely contain background factual analysis and that the documents were released to Mr. Nixon and leaked to a newspaper reporter who discussed the contents of the documents publicly. New rules governing what properly constitutes a "cabinet confidence", and in what circumstances cabinet confidences should not be treated as confidential, are urgently needed.

We recommend that these rules be developed by the Special Parliamentary Committee referred to in Recommendation 5 below.

4. Greater Openness of the Vetting Process

When passages from a document were deleted, the Committee had the benefit of being referred to a section of the *Access to Information Act* which indicated in general terms the reasons for the deletion. However, no information was conveyed to the Committee when an entire document was withheld.

⁴¹ (Ottawa: House of Commons, 1986). The Information Commissioner of Canada in his *1993-1994 Annual Report*, *ibid*, at 32 makes a similar recommendation.

We recommend that Counsel to the Committee be permitted to review all of the unexpurgated documents after having taken an oath of confidentiality. Counsel can then report to the Committee whether he or she believes that the policies relating to access to information have been correctly applied. In the absence of Counsel's advice, the Committee has no way of knowing whether to challenge the decisions made by government officials.

5. Further Examination Needed

The right of the Senate and the House of Commons to institute inquiries is fundamental to the Parliamentary Committee process. It is therefore imperative that the broad powers of parliamentary committees to send for persons, papers and records be recognized and respected. Parliament's right to initiate investigations should not be allowed to atrophy simply because the powers of parliamentary committees have seldom been fully exercised and consequently, are little understood.

We recommend that for reasons we have set out, the powers and the ability to discharge the mandate given to a parliamentary committee should be the subject of examination by a Special Joint Parliamentary Committee.

Appendix A - Witnesses

Witnesses	Organization	Date	Issue
Baker, Gordon	Counsel, Matthews Group	September 13, 1995 September 14, 1995	18 19
Bandeen, Robert	Interim Chair, Greater Toronto Regional Airport Authority	July 25, 1995	5
Barbeau, Victor	Assistant Deputy Minister, Transport Canada	July 11, 1995 July 12, 1995	2 3
Berigan, Gerry	Regional Director for Airports, Atlantic Region, Transport Canada	July 26, 1995	6
Bloodworth, Margaret	Privy Council Office	September 21, 1995	22
Bourgon, Jocelyne	Clerk of the Privy Council	September 14, 1995	19
Broadbent, David	Former Chief Negotiator, Transport Canada	August 2, 1995	9
Cappe, Mel	Former Deputy Secretary, Treasury Board	August 22, 1995	14
Church, Gardner	Former Deputy Minister, Government of Ontario	July 25, 1995	5
Clayton, Al	Bureau of Real Property and Material, Treasury Board Secretariat	July 12, 1995 August 22, 1995	3 14
Cloutier, John	Senior Financial Advisor, Airport Transfers, Transport Canada	July 26, 1995	6
Corbeil, The Hon. Jean	Former Minister of Transport	September 20, 1995	21
Coughlin, Peter	Chairman of the Pearson Development Corporation	September 12, 1995	17
Crosbie, Allan	Crosbie & Company Inc.	September 26, 1995 September 27, 1995 September 28, 1995 November 6, 1995	25 26 27 30
Desbois, Cameron	Vice-President and General Counsel, Air Canada	August 16, 1995	12
Desmarais, John	Senior Advisor to the Associate Deputy Minister, Transport Canada	August 3, 1995 August 15, 1995 October 23, 1995	10 11 29
Dickson, Don	Former Director General of Finance, Department of Transport	July 26, 1995	6

Appendix A - Witnesses

Witnesses	Organization	Date	Issue
Doucet, Fred	Fred Doucet Consulting International	August 24, 1995	16
Douglas, Austin	Former Associate Director, Transport Canada	July 11, 1995	2
Durrett, Lamar	Executive VP of Corporate Services, Air Canada	August 16, 1995	12
Edlund, L. Constance	Acting Director, Small Business Loans Administration, Industry Canada	July 27, 1995	7
Emerson, David	President and Chief Executive Officer, Vancouver Local Airport Authority	July 12, 1995	3
Farquhar, Michael	Director General of Airport Transfer, Transport Canada	July 25, 1995 July 27, 1995	5 7
Fiore, Dominic	Former Senior Director of Real Estate, Air Canada	August 16, 1995	12
Fox, William John	Earnscliffe Strategy Group	August 23, 1995	15
Gershberg, Sid	Assistant Secretary, Treasury Board Secretariat	August 22, 1995	14
Goudge, Stephen	Gowling, Strathy and Henderson	September 26, 1995 September 27, 1995 September 28, 1995 November 6, 1995	25 26 27 30
Green, Robert, Q.C.	Senior General Counsel, Department of Transport	October 23, 1995	29
Harrema, Gary	Chair, Regional Municipality of Durham	July 25, 1995	5
Heard, Andrew	Assistant Professor, Simon Fraser University	September 25, 1995	24
Hession, Raymond	Former President of Paxport Inc.	August 1, 1995 August 2, 1995	8 9
Jolliffe, Keith	Financial Advisor, Transport Canada	August 3, 1995 August 15, 1995	10 11
Kozicz, Peter	Vice-President, Pearson Development Corporation	September 21, 1995	22
L'Abbé, Robert	Raymond, Chabot, Martin et Paré	July 27, 1995	7

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Witnesses	Organization	Date	Issue
Labarge, Paul	Blake, Cassels & Graydon	September 21, 1995	22
Labelle, Huguette	Former Deputy Minister, Transport Canada	August 1, 1995	8
Lane, Ron	Former Chair of the Evaluation Committee	July 26, 1995	6
Lewis, The Hon. Doug	Former Minister of Transport	July 13, 1995	4
Mallory, James	Professor Emeritus, McGill University	September 25, 1995	24
Matthews, Donald	Chairman of the Matthews Group Ltd	September 13, 1995 September 14, 1995	18 19
Matthews, Jack	President, Paxport Inc.	September 21, 1995	22
McCallion, Hazel	Mayor of Mississauga	September 19, 1995	20
Meinzer, Gerry	Former Interim Chair, Greater Toronto Regional Airport Authority	July 25, 1995	5
Metcalfe, Herb	Capital Hill Group	August 23, 1995	15
Mulder, Nick	Deputy Minister, Transport Canada	July 11, 1995	2
Near, Harry	Earnscliffe Strategy Group	August 23, 1995	15
Neville, William	Hession, Neville and Associates	August 24, 1995	16
Nixon, Robert	Chairman of the Board, Atomic Energy of Canada Ltd.	September 26, 1995 September 27, 1995 September 28, 1995 November 6, 1995	25 26 27 30
Pascoe, Andrew	Andrew Pascoe Inc.	August 24, 1995	16
Pigeon, Jacques, Q.C.	General Counsel, Department of Transport	October 23, 1995	29
Power, Wayne	Director of Transition, Pearson International Airport, Transport Canada	July 26, 1995	6
Quail, Ranald	Former Associate Deputy Minister, Transport Canada	August 23, 1995	15
Robinson, David	Director of Real Estate, Air Canada	August 16, 1995	12
Rowat, William	Former Associate Deputy Minister, Transport Canada	August 3, 1995 August 15, 1995 October 23, 1995	10 11 29

Appendix A - Witnesses

Witnesses	Organization	Date	Issue
Shortliffe, Glen	Former Clerk of the Privy Council and former Deputy Minister of Transport	July 13, 1995 September 25, 1995	4 24
Simke, John	Price Waterhouse	August 23, 1995	15
Sinclair, Gordon	Former President of Air Transport Association of Canada	August 17, 1995	13
Spencer, Norman	Executive Vice-President, Pearson Development Corporation	September 12, 1995	17
Stehelin, Paul	Deloitte & Touche	August 17, 1995	13
Swain, Harry	Deputy Minister, Industry Canada	July 27, 1995	7
Thomson, George	Deputy Minister, Department of Justice	September 21, 1995	22
Turner, Stephen	Audit and Evaluation Branch, Public Works Canada	July 12, 1995	3
Vineberg, Robert	Counsel, Pearson Development Corporation	September 12, 1995	17
Warwick, Ed	Former General Manager, Major Crown Projects, Pearson Airport	July 11, 1995 July 12, 1995	2 3
Wilson, John	Professor, University of Waterloo	September 25, 1995	24

Appendix B - Chronology

Establishment of Terminal 3 at Lester B. Pearson International Airport

Sept. 1986	Minister of Transport John Crosbie announces initiative for construction of a new Terminal at Pearson International Airport with a call for expressions of interest from the private sector developers to design, finance, build and operate a new Terminal 3.
Dec. 18, 1986	Request for proposals to construct Terminal 3.
Apr. 9, 1987	Minister Crosbie, announces new Airport policy. Its broad objectives are to permit airports to better serve local community interests, to enhance regional economic development potential, to allow the national airport system to operate in a more cost efficient manner. Includes 8 guiding principles under which airports transfer would be considered.
May 1, 1987	Minister Crosbie announces receipt of 4 proposals for Terminal 3. They are from Airport Development Corporation (Huang and Danczkay), Falcon Star, a Bramalea-Ward Air Consortium and a Cadillac Fairview-American Airlines consortium.
June 22, 1987	Airport Development Corporation is selected as the preferred developer to construct and operate Terminal 3 at Pearson.
Oct. 14, 1987	Minister Crosbie announces Treasury Board authorization for Transport Canada to enter into an agreement with Airport Development Corporation.
Nov. 20, 1987	Agreement signed with Airport Development Corporation
Apr. 21, 1988	Ground lease for Terminal 3 signed with Airport Development Corporation. Construction begins in May.
June 14, 1989	Claridge Properties Ltd. acquires control of Terminal 3 from Huang and Danczkay.
Feb. 21, 1991	Terminal 3 (\$520 million facility) opens for business.
Apr. 5, 1992	Claridge acquires a 73% stake Terminal 3. Lockheed Air Terminals of Canada took the remaining 27%.

Appendix B - Chronology

The Request for Proposals for Terminals 1 and 2

Jan. 4, 1988	Glen Shortliffe named Deputy Minister of Transport
Feb. 1988	Report called "Transport Canada Airports Authority Model" approved. It contains 117 recommendations to improve revenue enhancement/cost recovery in the airport system.
Mar. 30, 1988	Creation of an Airport Authority Group in Transport Canada to be responsive to proposals from eligible local bodies interested in taking over ownership and/or operation of local airports.
Apr. 1988	Benoit Bouchard named Minister of Transport.
July 1988	An eight member private sector Airport Transfer Advisory Board headed by the Deputy Minister of Transport is formed to advise the Minister about proposals on airport transfers. A Departmental Airport Transfer Task Force is formed to undertake negotiations for the transfer of major federal airports to local control.
Dec. 12, 1988	Department of Transport announces a cap of 70 peak hour aircraft movements (take-offs or landings) a decrease of 15% over previous levels in order to reduced delays at Pearson.
Jan. 5, 1989	Ray Hession, on behalf of Matthews Group, meets with Glen Shortliffe who gives him an overview of the Government's strategic objectives over the next few years and suggest he meet with the Executive Director of the Airport Authority Group.
Feb. 28, 1989	Protocol between Air Canada (Doug Port) and Transport Canada (Chern Heed) for the Funding and Refurbishment of Terminal 2.
Apr. 1989	Toronto Metro Council sets up a task force to look into the creation of the Greater Toronto Airports Authority.
Apr. 1989	Concept Plan to Expand Pearson submitted by Airport Development Corporation.
May 24, 1989	Ray Hession meets with Victor Barbeau Assistant Deputy Minister of Transport to discuss development at Pearson.
May 31, 1989	Ray Hession meets with Kenneth Sinclair, Assistant Deputy Minister Transport and Fred Gorbet, Deputy Minister of Finance, to discuss Pearson and advises them that an unsolicited proposal will be forthcoming shortly.
May 1989	36 supplementary principles (to the 8 Guiding principles of Apr. 9, 1987) are introduced to provide guidance to groups interested in managing Transport Canada airports across the country.

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June 1989	Liberal Party Task Force head by John Nunziata concludes that Pearson is one of the worst airports in the world with a high risk of collision due to high volume of traffic.
June/July 1989	Letters of Intent to enter into formal airport transfers negotiations signed by the federal government with the heads of local groups in Edmonton, Calgary, Vancouver and Montreal.
July 13, 1989	Ray Hession meets with Dennis Groom, Executive Vice President of Air Canada to discuss proposal for Pearson.
July 26, 1989	Agreement between Transport Canada (Gerry Berigan and Brian Kelly) and Air Canada (Dennis J. Groom) regarding principles for a long term lease and the construction of additional runways. Other matters such as moving some Charters to Hamilton were also agreed.
Aug. 17, 1989	Letter confirming Government acceptance of agreement with Air Canada worked out on July 26 (Guiding Principles for Air Canada Lease). Signed by Glen Shortliffe for Transport Canada
Aug. 22, 1989	Glen Shortliffe writes to Ray Hession that the Request for Proposal process will be open and public.
Sept. 1989	Base Case Reports on the airports in Vancouver, Montreal, Edmonton, Calgary prepared for the Airport Transfer Task Force. Local groups to look into Local Airport Authority's formed in other cities including Moncton, Winnipeg, Windsor, Thunder Bay and Kamloops and Quebec City. The idea of a Local Airport Authority for the Toronto Airport is being promoted by a special Greater Toronto Co-ordinating Committee.
Sept. 25, 1989	Paxport Management Inc., a joint venture company formed by the Matthews Group and Bramalea Limited, submit to Minister Bouchard an unsolicited proposal to privatize Terminals 1 and 2 at Pearson.
Oct. 2, 1989	Ray Hession informs several individuals about Paxport proposal and asks for opportunity to discuss it with them. These meetings continue over the next several months.
Oct. 2, 1989	Victor Barbeau does a critique of the unsolicited Paxport proposal for Glen Shortliffe. Among other things notes that the Minister is committed to an environmental review before making a final decision.
Nov. 28, 1989	Joint announcement by Transport Canada and Air Canada regarding \$52 million improvements to Terminal 2.
Feb. 23, 1990	Doug Lewis named Minister of Transport

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- Mar. 16, 1990 Alan Tonks, Chair of the Municipality of Metro Toronto writes to Minister Lewis advising him of the progress of a community task force regarding the merits of a Toronto Local Airport Authority.
- Mar. 20, 1990 Document for Ministerial Briefing on Pearson Airport prepared by the department. Topics include traffic situation, demand/capacity, organization, financial position, performance indicators, economic impact, noise management, international waste, terminal renovation, environmental issues, etc.
- Apr. 4, 1990 Gerry Berigan of Transport Canada prepares detailed commentary on Ray Hession proposal.
- Apr. 23, 1990 Air Canada Executive Committee meets to discuss Pearson situation. They are not convinced the government will insist that Air Canada team with a private developer to develop Pearson.
- May 3, 1990 Canadian Airports Limited sends Minister Lewis an outline of a proposal to privatize Pearson Airport. Details to follow later.
- May 4, 1990 Minister Lewis meets with Pierre Jeanniot, President of Air Canada to discuss Air Canada position on redevelopment of Pearson. On May 15 Mr. Jeanniot sends a two page proposal that Air Canada and Transport Canada enter into negotiations to lease to Air Canada the land occupying the Terminal II complex for a period of 80 years. Air Canada to take full responsibility for terminal management.
- May 16, 1990 Victor Barbeau meets with Air Canada to discuss their proposal to redevelop Terminal 2.
- June 1, 1990 Pierre Jeanniot writes to Minister Lewis to recommend the Paxport proposal. He subsequently meets with him and outlines three critical issues for Air Canada including the possibility of being "held to ransom" if there is a competitive bidding process, the long term viability of Air Canada as a private company and the urgency of the situation.
- June 12, 1990 Doug Lewis replies to Alan Tonks saying Transport Canada is prepared to work closely with Regional and provincial officials toward creation of a Local Airport Authority.
- June 18, 1990 British Airport Authority announces its intention to bid on the Pearson redevelopment project.
- June 25, 1990 Canadian Airports Limited meets with Victor Barbeau, and others to discuss the main items that will be included in their unsolicited proposal.
- June 27, 1990 Minister Lewis replies to Air Canada proposal. He needs to consult with Cabinet. Commitment to proceed as expeditiously as possible.

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|----------------|---|
| July 1990 | Unsolicited proposal to modernize T1/T2 from Canadian Airport Limited. |
| Sept. 1, 1990 | Huguette Labelle named Deputy Minister of Transport. Glen Shortliffe named Associate Secretary to the Cabinet. |
| Sept. 11, 1990 | Meeting of Pearson Airport Steering Committee. Minister wants the Request for Proposal to be out by July 1991. |
| Oct. 9, 1990 | Minister Lewis tables Bill C-85 (<i>Airport Transfer Bill</i>). Sets out the definition of Local Airport Authorities (LAA) and the process for transferring control of airports to them. The Act requires the <i>Official Languages Act</i> and the <i>Canada Labour Code</i> apply to transferred airports and employees. (Adopted in Mar. 1992) |
| Oct. 17, 1990 | Minister Lewis announces that private sector participation in the modernization of Terminals 1 and 2 would be sought through a Request for Proposals. |
| Oct. 17, 1990 | Greater Toronto Area Airport Study Committee recommends no action be taken with respect to further privatization of LPBIA. |
| Oct. 18, 1990 | Minister Lewis meets with Paxport and other interested parties regarding the Request for Proposal and the evaluation process. |
| Nov. 1990 | Transport Canada produces document entitled Southern Ontario Strategy. |
| Nov. 26, 1990 | Ray Hession letter to Huguette Labelle suggesting that some in the Department do not seem to be taking the privatization policy seriously enough, particularly since the Greater Toronto Local Airport Authority has been lobbying for a local airport authority for Pearson. |
| Dec. 3, 1990 | D.A. Lychak, City Manager of Mississauga and Chair of Greater Toronto Local Airport Authority Technical Advisory Committee prepares a 3 page memorandum for Heads of Council in preparation for their meeting with Minister Lewis on Dec. 7. Calls for creation of a Task Force to prepare case for a Local Airport Authority. |
| Dec. 7, 1990 | Opening of new 40 million extension to international area of T2 |
| Dec. 7, 1990 | Minister Lewis meets with Ontario Ministers and Heads of Municipal Councils regarding redevelopment of Pearson. |
| Jan. 28, 1991 | Claude Taylor, Chief Executive Officer of Air Canada, points out that Air Canada will constitute 92% of Terminal 2 and makes case for Air Canada ownership of the Terminal. |

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- Feb. 15, 1991 Ed Philips, Ontario Minister of Transportation writes to Minister Lewis to support creation of a Local Airport Authority. Attaches document prepared by Heads of Councils. Includes details for specific consideration that should be included in the Request for Proposal.
- Mar. 6, 1991 Doug Port of Air Canada informs Ray Hession that Air Canada is obliged to make its statement of requirements to Transport Canada by Apr. 1. Air Canada has been told by Transport Canada not to use the opportunity to act on behalf of any third party. Air Canada sends a letter to Paxport severing their relationship.
- Mar. 28, 1991 Leo Desrochers, Executive Vice President of Air Canada, writes to Gerry Berigan arguing that Air Canada can run Terminal T1/T2 in a non discriminatory way towards other carriers.
- Apr. 4, 1991 Air Canada and Transport Canada official meet to get input for the Request for Proposal process.
- Apr. 15, 1991 Paxport invited along with other prospective bidders to meet with Victor Barbeau, Gerry Berigan, Wayne Power.
- Apr. 18, 1991 Ray Hession letter to Minister Lewis trying to reconcile arguments for going ahead with Request for Proposal with the need to wait for result of an environmental assessment for runway construction.
- Apr. 22, 1991 Jean Corbeil named Minister of Transport.
- May 9, 1991 Ray Hession writes to Huguette Labelle about rumours that Air Canada is working with a Local Airport Authority to put forth a proposal to manage and develop Pearson.
- June 12, 1991 Ray Hession meets with Glen Shortliffe now Associate Secretary to the Cabinet. He asks if the Privy Council Office would stand in the way of decoupling the Environmental Review for Airport and the Request for Proposal in order to avoid delaying the Request for Proposal beyond October. Glen Shortliffe says he would not object.
- July 30, 1991 Ed Philip (Ontario Minister of Transportation) writes to Minister Corbeil. Recommends that only T1 be privatized.
- Aug. 7, 1991 Minister Corbeil meets with Toronto Board of Trade. No decision yet as to when to proceed with redevelopment or whether to delink it from environmental assessment.

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Aug. 26, 1991	Leo Desrocher of Air Canada writes to Huguette Labelle. He notes that Transport Canada is about to proceed with an Request for Proposal. He points out that Air Canada has proposed an alternative that he thinks meets the objectives of Transport Canada. Urges reconsideration of this. Also refers to 1989 agreement between Glen Shortliffe and Denis Groom on guiding principles of Air Canada's long term lease. This agreement is still in effect.
Dec. 23, 1991	Canadian Airport Limited decides to pull out of bidding for Pearson.
Feb. 3, 1992	Minister Corbeil asks Canadian Airports Limited to reconsider decision to pull out of bidding.
Feb. 20, 1992	Treasury Board approves the issuance of the Pearson Request for Proposal.
Feb. 1992	Renovation of T2 Domestic wing and outbound baggage facility completed. Project jointly funded by AC and Transport Canada for a total cost of 112 million.

Evaluating the Request for Proposals

Mar. 16, 1992	Department of Transport releases its Request for Proposals. Interested parties have until June 19 to submit projects for redevelopment of T1/T2.
Apr. 7, 1992	Request for Proposal briefing organized by Transport Canada in Toronto.
Apr. 30, 1992	Addendum to Request for Proposal issued by Transport Canada relating to parking capacity, industrial benefits, pension plan and other matters.
May 1992	Project Evaluation Committee Chairman Ron Lane selected.
May 4, 1992	Price Waterhouse contracted to assist Department in evaluation of Request for Proposal.
May 7, 1992	Ray Hession writes to Minister Pouliot "it would be regrettable if your government should maintain its apparent preference for a single terminal operator"
May 21, 1992	Project Evaluation Committee meets including Price Waterhouse, Richardson Greenshields, Bobrow Eldon and other consultants.
May 22, 1992	Sid Valo write to Minister Corbeil to report on progress in establishing Toronto Local Airport Authority
May 27, 1992	Briefing notes on each of the proposals received prepared by Gerry Berigan.
June 1992	Firm of Raymond, Chabot, Martin, Paré engaged to audit the review of proposal.

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Dec. 7, 1992 Ministerial announcement that Paxport Inc had submitted best overall acceptable proposal.

Merger of Paxport and Claridge and Negotiating the Agreement

Dec. 7, 1992 Letter from Victor Barbeau to Paxport. Financial viability of the proposal to be demonstrated by Feb 15, 1993. This was later extended to Mar. 1

Dec. 15, 1992 Ray Hession and Jack Matthews meet Victor Barbeau and others from Transport. Discussion regarding the definition of financial viability.

Dec. 21, 1992 Ray Hession and Jack Matthews meet Minister Corbeil following their selection as best overall proponent to redevelop and manage T1/T2.

Dec. 22, 1992 Victor Barbeau writes to Ray Hession regarding financial viability. "It is not our intention to define for you what would constitute evidence of financeability which is satisfactory to the government...."

Jan. 1993 Ran Quail, Associate Deputy Minister of Transport, named Chief negotiator for Government.

Jan. 7, 1993 Meetings between Transport Canada and Paxport regarding financeability questions.

Jan. 14, 1993 Agreement between Airport Terminal Development Group and Paxport outlining in detail how the groups will work together.

Jan. 14, 1993 Deloitte & Touche engaged to assist with evaluation of financeability of proposal.

Jan. 20, 1993 Chern Heed drafts memo for Ran Quail on proposed merger of two proponents.

Jan. 21, 1993 Preparation of an Issues/Concerns paper on Terminal Redevelopment Project for Wayne Powers.

Jan. 27, 1993 Ran Quail briefs William Rowat of the Privy Council Office on Airport Terminal Development Group and Paxport proposal to join forces. Rowat prepares memo for Glen Shortliffe.

Jan. 28, 1993 Preparation of a list of issues for discussion at initial meeting with Paxport following the merger.

Jan. 28, 1993 Meeting of Wood Gundy, Paxport and Transport Canada official regarding financeability.

Feb. 1, 1993 Paxport and Airport Terminal Development Group announce a joint venture partnership which became T1/T2 Limited, later known as Mergco and later the

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- Pearson Development Corporation. The names of all partners and proposed percentage interests is set out.
- Feb. 3, 1993 Glen Shortliffe prepares Memorandum for the Prime Minister on status of Airport Terminal Development Group-Paxport joint proposal for redevelopment of T1/T2.
- Feb. 11, 1993 Greater Toronto Regional Airport Authority receives briefing from two Department of Transport official on the Airport Transfer Process and the 36 Supplementary Principles.
- Feb. 12, 1993 Ran Quail advises that he has been appointed Deputy Minister of Public Works and that a new Chief Negotiator will have to be named. Letter to extend deadline for demonstrating financeability is sent to Jack Matthews.
- Feb. 17, 1993 City of Mississauga passes resolution supporting establishment of Local Airport Authority.
- Feb. 18, 1993 Announcement of Government decision to proceed with Runway Construction projects at Pearson International Airport.
- Feb. 19, 1993 William Rowat prepares update on redevelopment memo for Glen Shortliffe. Prospects for a deal do not seem great".
- Feb. 19, 1993 Victor Barbeau briefly assumes role as Chief Negotiator replacing Ran Quail.
- Feb. 22, 1993 Deloitte & Touche study on financeability of Paxport concludes that about 58 million can be funded by the participants.
- Feb. 26, 1993 Jack Matthews writes to Huguette Labelle suggesting that Paxport has provided all necessary proof of financeability. Requests that negotiations begin immediately.
- Mar. 3, 1993 Paxport rejects opinion of Deloitte & Touche regarding financeability.
- Mar. 3, 1993 Memorandum of agreement between Allders and Paxport including loan of 29 million dollars to Paxport.
- Mar. 9, 1993 Gerry Meinzer, Interim Chair of the Greater Toronto Regional Airport Authority, writes to Minister Corbeil informing him of the creation of the Greater Toronto Regional Airport Authority which is in the process of incorporation. Seeks formal endorsement of the minister of Transport.
- Mar. 12, 1993 Mel Cappe of Treasury Board provides Deputy Minister Ian Clark with update on the status of negotiations. Notes that Paxport unhappy at what they see as bureaucratic stalling.

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- Mar. 15, 1993 Jack Matthews letter to Minister Corbeil expressing unhappiness with delays. Requests a date be set for completion of negotiation -- May 15, 1993.
- Mar. 19, 1993 Dave Broadbent appointed Managing Consultant and Chief negotiator for the project.
- Mar. 22, 1993 Memorandum updating Prime Minister on Redevelopment Progress from Glen Shortliffe.
- Mar. 23, 1993 David Broadbent meets with Jack Matthews Peter Coughlin and others to set up a work plan and to consider approach to dealing with Air Canada.
- Mar. 26, 1993 Meeting between Dave Broadbent, Keith Jolliffe, two Justice lawyers and Jack Matthews, and Peter Coughlin to discuss arrangements for negotiations. "Blockers and Issues" paper distributed to them.
- Mar. 30, 1993 Meeting between Glen Shortliffe and Dave Broadbent with Peter Coughlin and Charles Bronfman to discuss various issues involved in the deal. Jack Matthews, Peter Coughlin and others meet Dave Broadbent for further discussion of Blockers and other issues.
- Mar. 31, 1993 Workplan proposal for negotiations prepared by Dave Broadbent.
- Apr. 2, 1993 Deputy Ministers meeting to assess the T1/T2 file which is characterized as "extremely messy."
- Apr. 5, 1993 Pearson Development Corporation and Transport Canada negotiating teams meet to establish timetable.
- Apr. 7, 1993 Memo from Glen Shortliffe to Prime Minister about continuing uncertainty regarding merger. Deadline is June 1 for a deal.
- Apr. 12, 1993 Ellis Don withdraws; Wood Gundy Capital withdraws from Paxport Group; rate of return not high enough.
- Apr. 21, 1993 Ontario Minister of Transport, Gilles Pouliot, writes to Gerry Meinzer endorsing the Greater Toronto Regional Airport Authority and asking it to resolve outstanding issues among the 5 local governments.
- Apr. 21, 1993 Transport Canada's proposed Management and Operation Plan given to Paxport.
- Apr. 28, 1993 Summary of Structure and partnership arrangements between the Paxport group and the Airport Terminal Development Group.

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May 3, 1993	Robert Bandeen, newly appointed Chairman of Greater Toronto Regional Airport Authority writes to Minister of Transport asking to begin negotiations for the transfer of Pearson to them. Asks for meeting with Minister.
May 3, 1993	Agreement signed by Peter Coughlin and Jack Matthews to create Pearson Development Corporation. Management and operations plan submitted by Jack Matthews Airport Terminal Development Group sends letter asking to withdraw its proposal and requests return of security deposit.
May 4, 1993	Announcement that negotiation commenced.
May 5, 1993	Pearson Development Corporation Plan presented containing certain changes from the original Paxport proposal.
May 5, 1993	Construction starts for North South Runway at Pearson Airport
May 6, 1993	Minister Corbeil asks Gerry Meinzer to resolve the many outstanding issues stemming from the local/regional government resolutions.
May 11, 1993	Jack Matthews writes to Minister Corbeil regarding the process for T1/T2. Response on June 28.
May 12, 1993	Trevor Carnahoff prepares position paper on Revised Terminal Plan prepared. Relates to revision to original Development Plan.
May 12, 1993	Wayne Power and Chern Heed oppose providing any guarantees of passenger levels. Dave Broadbent prepares memorandum on "Trigger Points and Stewardship".
May 13, 1993	Steven Shaw of Greater Toronto Regional Airport Authority writes to Michael Farquhar of Transport Canada to advise that the approved changes made by the Authority to the General Operating By-Law and the Nominating Process to make them acceptable to the federal government.
May 13, 1993	Meeting of Minister Corbeil and Robert Bandeen Chair and Anne Edgar Vice-Chair of the Greater Toronto Regional Airport Authority. It was agreed to provide the Minister with the necessary unequivocal local/regional government resolutions of support without qualification or reserve.
May 13, 1993	Region of Peel strongly opposes transfer of Pearson Airport without also including Island Airport.
May 17, 1993	Further memorandum from Dave Broadbent regarding Critical Issues in T1/T2 negotiations

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- May 18, 1993 Jack Matthews and Peter Coughlin write to Dave Broadbent about key issues to be resolved. Response from Broadbent. Counter proposal from Pearson Development Corporation.
- May 20, 1993 Dave Broadbent response to Pearson Development Corporation counter proposal.
- May 25, 1993 Details of arrangements between Allders and Pearson Development Corporation. Air Canada outlines its proposed payment terms in letter to Chern Heed. Accepted with some changes by Transport Canada on May 31 and by Air Canada on June 4.
- May 27, 1993 Victor Barbeau asked by Deputy Minister of Transport, Huguette Labelle to leave the Department for four to five weeks because there was a perception that he was obstructing the privatization file.
- May 31, 1993 Pearson Development Corporation asks Dave Broadbent to enter into agreement and appoint arbitrators to deal with outstanding issues.
- June 8, 1993 Statement on Crown's position on a number of issues under negotiation prepared by Dave Broadbent. Proposed charging policy for T1/T2 and comments on it by Transport Officials.
- June 14, 1993 William Rowat memo to Glen Shortliffe re Strategy to handle Air Canada lease situation including agreement with Pearson Development Corporation for access rights to redevelop T2, including compensation for unamortized value of Air Canada's investment in T2.
- June 15, 1993 Deputy Ministers meeting to discuss status of T1/T2 project and the departure of Dave Broadbent.
- June 15, 1993 William Rowat moved from the Privy Council Office to Transport where he becomes Associate Deputy Minister and takes over the Pearson negotiations.
- June 15, 1993 Robert Bandeen wrote Minister Corbeil enclosing local/regional government resolution and asking for formal endorsement of the Minister to start airport transfer negotiations on an urgent basis.
- June 16, 1993 Letter from Huguette Labelle to Air Canada and to partners in Pearson Development Corporation acknowledging that Air Canada may have a 20 year commitment and two 10 year options.
- June 18, 1993 Huguette Labelle on behalf of Minister of Transport and Pearson Development Corporation sign a letter of understanding which was not legally binding. "The parties shall make reasonable efforts to finalize all the Final Documents on or before July 15, 1993."
- June 25, 1993 Kim Campbell succeeds Brian Mulroney as Prime Minister.

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June 25, 1993	Jocelyne Bourgon named Deputy Minister of Transport. Huguette Labelle moves to Canadian International Development Agency.
June 28, 1993	Alan Tonks writes to Minister Corbeil about support for Local Airport Authority
June/July, 1993	Pearson Development Corporation meetings with Air Canada and with William Rowat.
July 1993	Peat Marwick prepare Statements for Airport Revenue and Cost for year ended March 31, 1992
July 3, 1993	Victor Barbeau reintegrated to his position as Assistant Deputy Minister.
July 7, 1993	Victor Barbeau prepares background brief for Jocelyne Bourgon on Airport Transfers and Toronto Local Airport Authority.
July 7, 1993	Provisions of Ground Lease respecting Leasehold Mortgagees sent to Robert Vineberg by Jacques Pigeon.
July 8, 1993	Minister Corbeil meets Robert Bandeen with respect to requirement for unconditional local/regional government resolutions endorsing the Greater Toronto Regional Airport Authority.
July 8, 1993	Jack Matthews and Peter Coughlin meet Minister Corbeil to review the direction of current negotiations, particularly regarding Air Canada's tenancy. They say negotiations with Air Canada are at a standstill because they have a vested interest in the status quo. They ask the Minister to consummate the deal that will make Pearson Development Corporation Landlords so as to facilitate the signing of an agreement between them and Air Canada. William Rowat prepares briefing note for Minister to deal with this and other questions.
July 9, 1993	Minister of Transport meets the Mayor of Mississauga regarding the need for a resolution of unconditional support for the Greater Toronto Regional Airport Authority without the requirement for, but not necessarily foreclosing the possibility of, a subsequent transfer of the Toronto Island Airport.
July 13, 1993	William Rowat informs Pearson Development Corporation that Minister wants Local Airport Authority principles followed in relation to leasehold mortgage provisions. Will Lipson of Peat Marwick provides Norman Spencer with analysis of Guiding Principles for Air Canada Lease Agreement.
July 14, 1993	Memo on "Nightmare Scenarios" in case Air Canada and Pearson Development Corporation cannot come to agreement.
July 16, 1993	Will Lipson of Peat Marwick provides Norman Spencer with analysis of Pearson Airport Ground Rent contract.

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- July 21, 1993 Pearson Development Corporation Agreement in principle with Air Canada on a 37 year lease at closing of deal.
- July 27, 1993 William Rowat asks Pearson Development Corporation to accept 15% reduction for airlines lease and share 10% of net income with airlines. Summary of the status of negotiations prepared by Wayne Power.
- Aug. 1993 Claridge acquires 15% more of Pearson Development Corporation.
- Aug. 3, 1993 Cabinet Committee on Operations meets to discuss redevelopment of Pearson Terminals 1 and 2.
- Aug. 4, 1993 Request for Proposals for runway Development and operation - includes financing, design and construction.
- Aug. 10, 1993 Memorandum from William Rowat, outlining the remaining steps before an agreement can be signed. Likely closing date to be end of September.
- Aug. 11, 1993 Minister Corbeil asks Mayor Hazel McCallion of Mississauga for resolution of unconditional support. Also letter to Robert Bandeen on this point.
- Aug. 17, 1993 Deloitte & Touche provide William Rowat with opinion on financeability of Pearson Development Corporation.
- Aug. 18, 1993 Robert Bandeen wrote to Minister Corbeil asking that Greater Toronto Regional Airport Authority be formally endorsed by the federal government without the requirement of a new resolution from the City of Mississauga.
- Aug. 27, 1993 Order-in-Council authorizes the Government to enter into agreement to lease T1/T2.
- Aug. 30, 1993 Minister Corbeil announces agreement reached with Pearson Development Corporation to redevelop and operate Terminal 1 and Terminal 2.
- Sept. 8, 1993 Federal election called.
- Sept. 13, 1993 Federal officials meet with Ministry of Transport Official from Ontario.
- Sept. 21, 1993 National Transportation Agency determines that transfer of the operations and management of Pearson is not subject to Part VII of the *National Transportation Act*.
- Sept. 21, 1993 Letter between Air Canada and the Government confirming that an agreement has been reached between Air Canada and Pearson Development Corporation. Air Canada to receive 15% deferment of its ground rent. Approved by Air Canada Board of Directors on Sept 24.

Appendix B - Chronology

- Sept. 25, 1993 *Ottawa Citizen* publishes article by Greg Weston critical of the Pearson deal. Another article on September 26.
- Sept. 27, 1993 William Rowat prepares response to *Ottawa Citizen* articles.
- Oct. 1, 1993 Advance ruling obtained from Bureau of Competition Policy. Not sufficient grounds to apply to the Competition Tribunal.
- Oct. 4, 1993 Pearson Development Corporation agrees to pay Matthews Investments Inc a consulting fee of \$350,000 per annum for ten years payable monthly starting on Oct. 31, 1993.
- Oct. 5, 1993 Ontario Transport Minister Gilles Pouliot writes to Minister Corbeil urging Ottawa to set aside the final agreement.
- Oct. 6, 1993 Economic Development and Planning Committee of the Municipality of Metro Toronto recommends that the Federal Government not proceed with privatization of terminal and runways at Pearson until a Local Airport Authority has an opportunity to be involved in the decisions.
- Oct. 7, 1993 William Rowat receives a written Directive from Jocelyn Bourgon that the Prime Minister has instructed the negotiator to proceed with the signature of the remaining legal documents on Oct. 7, 1993.
- Oct. 18, 1993 City of Toronto forwards motion requesting the Government of Canada to reverse its decision on privatization pending further consideration.
- Oct. 25, 1993 Federal Election.
- Oct. 26, 1993 T1/T2 agrees to postpone the Commencement date to Dec. 15, 1993.
- Oct. 26, 1993 John Desmarais prepares paper on Redevelopment options.
- Oct. 28, 1993 Paul Stehelin of Deloitte Touche writes to Keith Jolliffe of Transport Canada with an estimate of the cost of cancellation. (Between \$615 and 1,330 million.)

Appendix B - Chronology

Cancellation of the Agreement

- Oct. 27, 1993 Robert Nixon receives phone call from Jean Chrétien who asks him to analyse the Pearson contract.
- Oct. 28, 1993 Robert Nixon meets with Jean Chrétien and Ed Goldenberg who ask him to inquire into Pearson Airport Agreement. Also engaged are Crosbie and Company.
- Oct. 29, 1993 Document "T1/T2 Privatization" faxed by William Rowat to Robert Nixon. Stan Keyes MP of Hamilton West writes to Mr. Nixon to express concern about the exclusion of airside development within 70 kilometres of Pearson Airport.
- Oct. 29, 1993 Robert Nixon meets Stephen Goudge and Brad Wilson.
- Oct. 31, 1993 Robert Nixon and Stephen Goudge meet Gardner Church.
- Nov. 1, 1993 Robert Nixon meets with Hazel McCallion, William Rowat, John Desmarais and Wayne Power.
- Nov. 1, 1993 Memorandum concerning Nixon contract prepared by Morris Rosenberg for Glen Shortliffe.
- Nov. 1, 1993 Seventeen government documents sent to Robert Nixon by Transport Canada including three Treasury Board submissions.
- Nov. 1, 1993 Original Commencement date for transfer of T1/T2 to Pearson Development Corporation. Glen Shortliffe asks parties to agree to a 45 day delay to give the new government time to study the agreement.
- Nov. 2, 1993 Robert Nixon meets with Allan Tonks who urges Mr. Nixon to recognize the Greater Toronto Regional Airport Authority.
- Nov. 2, 1993 Robert Nixon meets Council of Concerned residents. Wayne Power sends Robert Nixon closing documents that have been publicly released and Paxport Proposal Business Plan. Stephen Goudge asks William Rowat to provide a legal opinion as to whether there was a binding agreement with federal government as of Oct. 7.
- Nov. 3, 1993 Robert Nixon meets with Peter Coughlin and Pearson Development Corporation officials also with Mississauga Board of Trade and with Huguette Labelle.
- Nov. 4, 1993 Robert Nixon meets with Robert Bandeen and Local Airport Authority. Also meeting with Ontario Premier Bob Rae and Minister of Transportation Gilles Pouliot.
- Nov. 4, 1993 Chrétien Ministry sworn into office. Doug Young named Minister of Transport.

Appendix B - Chronology

- Nov. 4, 1993 A revised and expanded version of the Oct. 29 briefing paper is prepared by Department of Transport.
- Nov. 5, 1993 Gordon Dickson of Cassels Brock provides Stephen Goudge with excerpts from the various agreements which they believe are the most directly relevant to the inquiry
- Nov. 5, 1993 Robert Nixon meets with Peter Kozic和平 and Jack Matthews of Paxport.
- Nov. 8, 1993 Robert Nixon meets with Crosbie and Company. They provide a draft workplan and schedule for the Report.
- Nov. 9, 1993 Wayne Power provides Stephen Goudge with list of documents not released to the public for reasons of corporate confidentiality. Robert Vineberg sends Stephen Goudge booklet summarizing the various agreements.
- Nov. 10, 1993 Mississauga Council adopts resolution called for Robert Nixon to hold public hearings on the runway expansion proposal.
- Nov. 10, 1993 Robert Nixon meets Morrison Hershfield Group.
- Nov. 11, 1993 List of fees paid by Claridge to consultants provided to Stephen Goudge.
- Nov. 12, 1993 Chern Heed provides Robert Nixon with financial information on Pearson International Airport. Laurie Barrett of Osler, Hoskin and Harcourt provides copy of Ground Lease and other documents relating to Vancouver International Airport.
- Nov. 15, 1993 Meeting of Gordon Dickson of Cassels Brock with Stephen Goudge and R.J. Green and Jacques Pigeon of Justice and John Desmarais of Transport Canada. Copies of several legal documents provided the following day.
- Nov. 15, 1993 Robert Nixon requests information from Transport Canada regarding operation of T1/T2. Response by John Desmarais on Nov. 22.
- Nov. 17, 1993 Robert Nixon meets with Board of Trade of Metro Toronto.
- Nov. 18, 1993 Ontario Government submission to Nixon Committee. Critical of various aspects of the Pearson lease.
- Nov. 18, 1993 Crosbie and Company prepare Review of Pearson International Airport for presentation to Robert Nixon. Concludes that internal rate of return to investor at T1/T2 about 14% (or 23% pretax).
- Nov. 18, 1993 Crosbie, Nixon and Goudge meet to determine final position and documentation to accompany the final report.

Appendix B - Chronology

Nov. 25, 1993	Chern Heed, manager of Toronto Airport, takes a job as commercial director of Hong Kong airport authority.
Nov. 26, 1993	Further study by Crosbie and Company on rates of return.
Nov. 29, 1993	Letter from Robert Nixon to Jean Chrétien with copy of report.
Dec. 3, 1993	Release of Nixon report and press release.
Dec. 11, 1993	In a letter to <i>Ottawa Citizen</i> Ray Hession calls for investigation by the Auditor General to clear the name of those businessmen who reputations were damaged from the cancellation.
Dec. 13, 1993	In response to request from Minister Young to further extend the commencement date to Jan. 30, T1/T2 partnership says this is unacceptable unless Government agrees to go ahead with deal at this time.
Dec. 14, 1993	Minister Young asks T1/T2 to surrender their interests in the Lease and reconvey the Premises to Her Majesty on a "without prejudice" basis.
Dec. 15, 1993	Scheduled Transfer Date of T1/T2 to Pearson Development Corporation (before deal was cancelled).
Dec. 15, 1993	Robert Vineberg writes to Stephen Goudge about inaccuracies in Nixon report.
Feb. 1994	Royal Bank pushes Matthews Group and Matthews Construction into receivership.
Mar. 1994	Robert Nixon appointed Chairman of Atomic Energy of Canada.
Apr. 1994	Negotiations over compensation break down. Pearson Development Corporation seeking around 200 million including foregone profits and lobbying fees. Out of pocket expenses are in the range of 30-40 million.
Apr. 13, 1994	First reading of Bill C-22 in the House of Commons.
May 9, 1994	Nick Mulder named Deputy Minister of Transport.
May 26, 1994	House Standing Committee on Transport hears from Ray Hession and Robert Vineberg.
May 31, 1994	House Standing Committee on Transport hears from Air Canada, Donald Matthews, and Douglas Young.
June 9, 1994	Standing Committee on Transport hears from Jean Desmarais and Jacques Pigeon General.

Appendix B - Chronology

June 9, 1994	Reform Transport Critic Jim Gouk proposes amendments to C-22 to allow standing committee on Transport to study all claims for compensation and make recommendations.
July 6, 1994	Senate Legal and Constitutional Affairs Committee recommends to permit full compensation up to Apr. 13, 1994.
July 13, 1994	New National Airport Policy published. Proposed establishment of Canadian Airport Authorities with provision for appointment of some members by federal government.
Sept 16, 1994	Lawsuit for breach of contract launched by 9 members of the Pearson Development Corporation.
Nov. 1, 1994	William Dimma and Joanne Yaccato are federal nominees to the Pearson Canadian Airport Authority.
Dec. 2, 1994	Minister Young and Robert Bandeen sign a letter of intent to turn Pearson over to a non profit airport authority.
Dec. 8, 1994	In the House of Commons Prime Minister Chrétien denies speaking to Jack Matthews about the Pearson proposal when he was in law practice with Lang, Michener.
Jan. 30, 1995	Pearson Development Corporation wins right to sue federal government in a decision of the Ontario Court, General Division.
Mar. 27, 1994	Jocelyne Bourgon named Clerk of the Privy Council.
Mar. 28, 1995	Baker Report to the Senate Committee on Legal And Constitutional Affairs Respecting C-22.
May 4, 1995	Senate adopts motion to establish a special committee.
May 23, 1995	Ontario Court of Appeal dismisses a government appeal of a lower-court ruling that declared Ottawa was liable for cancellation of the contracts.
July 11, 1995	Special Senate Committee begins hearings
December 1995	Report of Special Senate Committee

Appendix C - Biographical Notes Relating to the Pearson Airport Agreement

AGRA Industries Limited. An international company involved in two core business areas: Engineering Construction and Technology; and Resource Recovery and Recycling. William Pearson President.

Airport Development Corporation. Chosen by the Government as the preferred developer to construct and operate Terminal 3 at Pearson Airport. Included Huang & Danczkay Properties and Lockheed Air Terminals, also Scott and Associates, Marshall Macklin Monaghan, Murray and Co.

Airport Terminal Development Group Inc. An Ontario Limited partnership. Peter Coughlin, President, Norman Spencer, Vice President. One of two groups (along with Paxport) whose proposal was considered by the Proposal Evaluation Committee. A wholly owned subsidiary of Toronto Airport Terminals Investors Inc which is controlled jointly by Charles R. Bronfman and the Charles R. Bronfman Trust.

Allders International. Duty free operator with outlets in 13 Canadian airports including Terminal 3. It is owned by AGRA Industries Limited. Scott McMaster President (Canada).

***Baker, Gordon R.** Counsel to Matthews Investments and to the Paxport Group with respect to negotiations with Claridge. Director and Member of Management Committee of Pearson Development Corporation. Prepared submission to the House Transport Committee on May 31, 1994 and the Senate Committee on Legal and Constitutional Affairs, March 28, 1995.

***Bandeen, Robert.** Former President of Canadian National. Head of Greater Toronto Regional Airport Authority. Interested in taking over Pearson and run it as a Local Airport Authority.

***Barbeau, Victor.** Assistant Deputy Minister, Transport Canada, in charge of Airports.

***Berigan, Gerry.** Corporate Planner of Special Projects at Transport Canada.

Bouchard, Benoit. Minister of Transport April 1988 - February 23, 1990.

***Bourgon, Jocelyne.** Deputy Minister of Transport 1993-1994; Clerk of the Privy Council since 1994.

Bracknell Corp. Construction company. George Ploder, President.

***Broadbent, David.** Asked by Huguette Labelle to come it to take over as Chief negotiator for Transport Canada in March 1993. Left in July 1993.

Bronfman, Charles. Quebec businessman. Claridge Investments.

Campbell, Kim. Prime Minister at the time the Pearson agreement was signed.

Canadian Airports Limited. Included Ellis-Don Construction, Zeidler Roberts, Confederation Life, Toronto Dominion Bank, Cogan Corp. and British Airport Authority. Made unsolicited and unsuccessful proposal to privatize Pearson.

Appendix C - Biographical Notes Relating to the Pearson Airport Agreement

Cassels, Brock & Blackwell. Retained to provide legal Counsel to Department of Transport during negotiations.

Chrétien, Jean. Elected Leader of the Liberal Party in June 1990. Became Prime Minister of Canada in November 1993

***Church, Gardner.** Former Deputy Minister for the Government of Ontario

CIBC Wood Gundy Capital Inc. A Joint Venture Company formed in 1989 between Canadian Imperial Bank of Commerce and its subsidiary Wood Gundy Inc. Former partner of Paxport.

Claridge Properties Ltd. Competitor of Paxport. Consists of the Charles R. Bronfman Trust and Lockheed Corporation or their related companies. Unsuccessful bidder on the original Request for Proposal. Later merged with Paxport to create Pearson Development Corporation.

***Clayton, Al.** Executive Director, Bureau of Real Property and Material, Treasury Board Secretariat

***Corbeil, Jean.** Minister of Transport April 22, 1991 to November 4, 1993.

***Coughlin, Peter.** President of Claridge. CEO of Pearson Development Corporation. President and CEO of several other associated companies.

Crosbie, John. Minister of Transport, from 1986-1988

***Crosbie Allan.** Principal in Crosbie and Company Inc (Toronto). Advisor to Robert Nixon on financial aspects of the agreement

Deloitte & Touche Inc. Retained by the Department of Transport to assess Paxport's demonstration of financeability. Reported that the value to the Crown of Paxport proposal was \$800 million.

***Desmarais, John.** A Senior Advisor of Operations, Airport Group, Department of Transport. One of the principal negotiators of the airport contracts. Also involved in preparing the Request for Proposal and in evaluating proposals that were submitted.

***Dickson, D G.** Director General of Finance at Transport Canada.

***Doucet, Fred.** Lobbyist hired by Paxport.

***Douglas, Austin.** Former Associate Director of Airport Group, Transport Canada.

***Edlund, Constance.** Acting Director, Small Business Loans Administration. She undertook an evaluation of the Paxport proposal for the Ministry of Industry.

Ellis-Don Inc. A large Canadian construction company founded in 1951. Partner with Paxport until withdrawing. Donald J. Smith, Chairman and CEO at the time of the involvement with Paxport.

Appendix C - Biographical Notes Relating to the Pearson Airport Agreement

- *Farquhar, Michael.** Director General Corporate Planning/Airport Transfers with Transport Canada.
- *Fiore, Dominic.** Director of Real Estate for Air Canada at the time of the deal.
- *Fox, William.** Lobbyist for Claridge.
- *Goudge, Stephen.** Counsel for Robert Nixon regarding Pearson investigation.
- *Green, Robert.** Lawyer from Justice asked by Dave Broadbent to join negotiation team at Transport.
- *Harrema, Gary.** Chairman of the Regional Municipality of Durham.
- Heed, Chern.** Former manager at LBPIA.
- *Hession, Raymond.** Chairman of Paxport at the time it made its successful proposal to develop and manage Terminals 1 and 2. Presently CEO of Hession, Neville and Associates.
- Huang, Michael.** Businessman in Toronto and partner with Bela Danckzkay in consortium formed to build Terminal 3.
- Jelinek, Otto.** Former Minister of Revenue. Later did work for Matthews Middle East and Asia Inc.
- Jeanniot, Pierre.** Former President of Air Canada
- *Jolliffe, Keith.** Financial Advisor to Transport Canada. Worked with various Transport Canada negotiators.
- *Kozicz, Peter.** Senior Vice-President, Pearson Development Corporation.
- *L'Abbée, Robert.** Member of management consulting firm Raymond, Chabot, Martin, Paré hired to audit the Proposal evaluation process.
- *Labelle, Huguette.** Deputy Minister of Transport 1990 - 1993.
- *Lane, Ron.** Former Chairman of the Evaluation Committee.
- Legate, John.** Lobbyist hired by Paxport.
- LeLay, Richard.** Chief of Staff to Minister of Transport, Jean Corbeil.
- *Lewis, Doug.** Minister of Transport February 23, 1990 - April 22, 1991.
- LAH Ltd (744221 Ontario Inc).** Established November 12, 1987. Wholly owned by Lockheed Air Terminals Inc (Delaware) which is 100% owned by Lockheed Corporation (Delaware). Was a partner with ATDG in making a proposal for T1/T2 Project. Officers: Jerry Cance, Robert Shirriff, Assistant Secretary.

Appendix C - Biographical Notes Relating to the Pearson Airport Agreement

Martin, Shirley. Former Parliamentary Secretary to Minister of Transport.

Matthews Group Limited. Established in London, Ontario in 1953 and has become an international development company. Main partner in Paxport which made the best overall acceptable bid for Pearson Airport.

***Matthews, Donald.** Co-founder, Chairman and CEO of Paxport Inc and Chairman and CEO of Matthews Group Limited.

***Matthews, Jack.** CEO Paxport replaced Ray Hession after the Pearson contract was awarded to Paxport. Negotiated merger with Claridge to create Pearson Development Corporation.

Mazankowski, Don. Minister of Transport, September 17, 1984 to April 1988.

***McCallion, Hazel.** Mayor of Mississauga.

McMaster, Scott. Pearson Development Corporation Director, General Manager of Allders International Canada Ltd, and spokesman for group seeking compensation.

***Meinzer, Gerald.** Former Interim Chair of Greater Toronto Regional Airport Authority.

Mergeco. The partnership of Claridge Group and Paxport Group with respect to Terminals 1,2,3. Later became Pearson Development Corporation.

***Metcalfe, Herb.** Liberal organizer and President of Capital Hill Group. Lead lobbyist for Claridge Properties.

***Mulder, Nick.** Deputy Minister of Transport since September 1994.

Mulroney, Brian. Prime Minister of Canada from 1984 to June 1993.

***Near, Harry.** Lobbyist hired by Claridge.

***Neville, William.** Lobbyists hired by Paxport.

Nixon, Robert. Prepared Report on the Pearson Airport deal.

NORR Partnership Limited. An architectural and engineering firm. Its subsidiary, NORR Airport Planning Associates has acted as project manager on 50 airport project including renovation to Terminal 2.

***Pascoe, Andrew.** Lobbyist for Paxport.

Paxport Inc. A consortium composed of Matthews Investment (32%), CIBC/Wood Gundy (13%), Alders (13%), Bracknell (13%) MGL, Agra, NORR, Sunquest and other related entities.

Appendix C - Biographical Notes Relating to the Pearson Airport Agreement

Price Waterhouse. Served as Evaluation Process consultant -- responsible for process development, format, security of the Request for Proposal.

Pearson Development Corporation (1032156 Ontario Inc). Established on June 3, 1993. This was to be the managing general partner for the partnership between the Claridge Group and the Paxport Group. The Board of Directors of the Pearson Development Corporation acted as a Management Committee in respect of the two partnerships. The Board comprised eight persons four of whom were named by each group. The Management Committee operated by majority except for a limited number of matters requiring unanimity. Officers included: Peter Coughlin, Chairman; John Pitcher, President and CEO; Norman Spencer, Executive Vice-President; Peter Kozic, Senior Vice-President, Boon Khaw, Senior Vice President, Robert Vineberg, Secretary, Robert Abrams, Assistant Secretary, Richard Lachcik, Director.

Pearson, William. President Agra Industries.

Peat Marwick Thorne. Accounting firm did estimate of return to Government from the deal.

***Pigeon, Jacques.** General Counsel, Department of Justice.

Ploder, George. President, Bracknell Corporation.

***Power, Wayne.** Director of Transition, Pearson International Airport.

***Quail, Ranald.** Associate Deputy Minister of Transport Canada and for a brief period Chief negotiator for Transport Canada before being replaced by David Broadbent.

Raymond, Chabot, Martin, Paré. Management consulting firm audited evaluation process.

Riopelle, Hugh. Lobbyist hired by Paxport. Former Air Canada PR representative.

***Rowat, William A.** Moved to Transport from PCO as Associate Deputy Minister just before Huguette Labelle left. Took over negotiations on behalf of Transport Canada from Dave Broadbent. He was Chief Negotiator at the time of closing. Now Deputy Minister in Fisheries and Oceans.

***Shortliffe, Glen.** Deputy Minister of Transport 1988 - 1990. Clerk of the Privy Council until 1993.

***Simke, John.** Advisor for Price Waterhouse, engaged by Transport.

***Sinclair, Gordon.** Former President of the Air Transport Association of Canada.

***Spencer, Norman.** Pearson Development Corporation Vice-President.

***Stehelin, Paul.** Author of study on T1/T2 for Deloitte & Touche.

Sunquest Vacations Limited. Canada's largest independent tour operator. All its tours arrive and depart from LB Pearson International Airport.

Appendix C - Biographical Notes Relating to the Pearson Airport Agreement

***Swain, Harry.** Deputy Minister, Department of Industry.

Swirsky, Ben. Chair CEO of Bramalea.

Torchinsky, Ben. Chair of Agra Industries owners of Allders.

T1/T2 Limited Partnership. Contractor with the federal government for the redevelopment of Pearson International Airport. The partners of T1/T2 are the Claridge Group, Agra Industries, Allders Canada Inc., the Bracknell Corporation, Hartay Enterprises, Lockheed Corporation, Matthews Group, Matthews Investment, and NORR Group Consultants.

T3LPCO Investment Inc . Investment Company operating Terminal 3 at Pearson. Officers: Peter Coughlin President, Norman Spencer, Vice-President, Robert S. Vineberg, Secretary, Robert J. Abrams, Assistant-Secretary.

***Vineberg, Robert.** Legal Counsel, Pearson Development Corporation.

***Warrick, Ed.** Former Project General Manager, Major Crown Projects.

Withers, Ramsay. Deputy Minister of Transport 1983 - 1988. In 1992 he became a lobbyist for Claridge Properties.

Wood Gundy Capital. Paxport shareholder. Withdrew during evaluation phase.

Wright, Robert. Hired to determine claims as a result of cancellation of contract. Former law partner of Jean Chrétien.

Young, Douglas. Minister of Transport. Testified to House Committee on Transport and Senate Committee on Legal and Constitutional Affairs regarding Bill C-22.

* Indicates they appeared as witness. See Appendix A.

Appendix D - Second Report of the Special Committee

TUESDAY, October 17, 1995

The Special Committee of the Senate on the Pearson Airport Agreements has the honour to present its

SECOND REPORT

On May 4, 1995, pursuant to a motion adopted by the Senate, your Committee was appointed to "examine and report upon all matters concerning the policies and negotiations leading up to, and including, the agreements respecting the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport and the circumstances relating to the cancellation thereof".

In order to carry out this mandate, it is crucial that your Committee be granted access to the Treasury Board Submissions of August 1993 concerning the Pearson Airport Agreements. Your Committee is satisfied that the release of these documents is in the public interest and constitutes a reasonable exception to the customary practice of respecting Cabinet confidentiality.

Therefore your Committee recommends that a humble address be presented to His Excellency the Governor General praying that he will cause to be laid before the Senate a copy of the Submissions to Treasury Board in August 1993 relating to the Pearson Airport Agreements.

Respectfully submitted,

FINLAY MACDONALD
Chairman

The following report was prepared for Prime Minister Chrétien by Robert Nixon and delivered to him on November 29, 1993. It was made public on December 3, 1993.

Over the course of the last 30 days, I have had the opportunity to review the agreement to privatize and redevelop Terminals 1 and 2 at Pearson Airport in Toronto. I have had counsel and business analysts consider all the contract documents making up that agreement. I have also had the opportunity to meet with a number of the individuals involved to gain an understanding of the agreement and the processes that led up to it. What follows is the result of what I have learned.

1. THE PROCESS TO PRIVATIZE TERMINALS 1 AND 2 AT PEARSON

On April 8, 1987, the Government of Canada issued its policy on a future framework for the management of airports in Canada. This policy together with the supplementary principles thereto focused very largely on the ownership and operation of airports by Local Airport Authorities. Only passing mention was made of private sector leasing as something which would be considered.

On June 22, 1987, the Government of Canada selected the Airport Development Corporation as the preferred developer to construct and operate Terminal 3 at Pearson. The Matthews Group of Companies sponsored an unsuccessful bid in this competition.

In September, 1989, the Matthews Group submitted an unsolicited proposal to the Government of Canada to privatize Terminals 1 and 2 at Pearson. This proposal was not accepted.

On October 17, 1990, the Government announced that private sector participation in the modernization of these two Terminals would be sought through a future Request For Proposals process. No details were provided.

On February 21, 1991, Terminal 3 opened for business. By this time Claridge Holdings Inc. (Claridge) had assumed effective control of Terminal 3.

On March 11, 1992, the Government of Canada issued a Request For Proposals (RFP) for the privatization and redevelopment of Terminals 1 and 2 at Pearson. Several aspects of this deserve

Appendix E - Report by Robert Nixon

highlighting. Firstly, the RFP preceded a decision on the proposed expansion of the runway system at the airport. Secondly, it called for a one-stage process. The competition for Terminal 3 involved a two-stage process, initially soliciting interested parties and selecting a short list of bidders, and then encouraging detailed submissions. Thirdly, the RFP did not set out many of the fundamental aspects of the proposed development, but left these to bidders to define for themselves. For example, projected passenger volumes, for the airport (fundamental to the pace and size of the redevelopment) were left to proponents to estimate. Finally, only 90 days were provided for responses.

Only two bids were submitted, one by Paxport Inc., controlled by the Matthews Group and the other by a group controlled by Claridge.

On December 7, 1992, Paxport Inc. was announced as the best overall acceptable proposal. It was required to demonstrate by February 15, 1993 to the satisfaction of the Government that its proposal was financially viable. Because Paxport could neither provide evidence of this, nor, according to its President, raise capital from other sources, it turned to Claridge for financial support.

On February 1, 1993, Paxport Inc. and Claridge announced a joint venture partnership (which became T1 T2 Limited Partnership) to pursue the redevelopment project in accordance with the Paxport Inc. proposal.

Between that date and May 1993, the new joint venture engaged in discussions with the Government of Canada concerning the financial viability of the project and other critical issues such as the lease with Air Canada.

By May of 1993 these issues had been sufficiently addressed for formal negotiations to commence. Claridge had by this time obtained effective control of the joint venture.

On June 18, 1993, the parties to the negotiation, Pearson Development Corporation (on behalf of T1 T2 Limited Partnership) and the Government of Canada signed a letter of understanding indicating that major substantive elements in connection with the proposed agreement had been identified and were therein described on a basis acceptable to the parties. This was explicitly not a legally binding agreement.

On August 30, 1993, the Minister of Transport announced that a general agreement had been reached with Pearson Development Corporation to redevelop and operate Terminals 1 and 2 and indicated that this agreement would be finalized in the fall with a legal agreement for the long-term management, operation and redevelopment of the Terminals.

On September 8, 1993, the Government of Canada called a federal election. Through September the pending agreement was the subject of controversy in the media and in the election campaign.

Appendix E - Report by Robert Nixon

Prior to the conclusion of the legal agreement the Leader of the Opposition (now the Prime Minister) indicated clearly that parties proceeding to conclude this transaction did so at their own risk and that a new government would not hesitate to pass legislation to block the privatization of Terminals 1 and 2 if the transaction was not in the public interest.

In these circumstances, and one supposes because of a concern about the propriety of moving to conclude this agreement at that time, the chief negotiator for the Government of Canada sought written instructions about whether to complete the transaction.

On October 7, 1993, he received his written direction indicating that it was the explicit instruction of the Prime Minister that the transaction be concluded on October 7, 1993.

On October 7, 1993, therefore, the legal agreement to privatize and redevelop Terminals 1 and 2 was made.

2. THE AGREEMENT TO PRIVATIZE TERMINALS 1 AND 2 AT PEARSON

This agreement is an enormously complicated transaction. There are over 20 separate contracts, agreements, leases and sub-leases. The three principal agreements are the Ground Lease, the Development Agreement and the Management and Operations Agreement. The following represents some of the highlights of each of these.

The Ground Lease

The Parties: Her Majesty the Queen in Right of Canada as represented by the Minister of Transport leases the Terminal 1 and Terminal 2 complex to T1 T2 Limited Partnership (the Tenant). The beneficial ownership of T1 T2 Limited Partnership was made known to the Government of Canada but was not made fully public when the agreement documents were partially disclosed during the election campaign.

The Term: The lease and option period run for 57 years regardless of whether or not any development beyond Stage 1B of the Development Agreement takes place. That development is triggered by certain events including passenger throughout. If those events do not transpire, the lease continues although the development will not.

The lease is for 37 years. There is an option to a separate corporate entity (controlled by the Tenant) to lease the same premises for a further 20 years. The explicit purpose of this split was to permit the Tenant to avoid the payment of land transfer tax to the Province of Ontario in the amount of approximately \$10 million.

The Rent: The annual rent to the Government of Canada for the first 9 years begins at \$27

Appendix E - Report by Robert Nixon

million annually and rises to \$30 million annually. Thereafter the rent is the greater of \$30 million annually adjusted for inflation and passengers, and a percentage of gross revenue.

There is a deferral of \$33 million of rent for lease years 2, 3 and 4, repayment to include interest. The result is that the actual rent in years 2, 3 and 4 of the lease will be substantially less than the \$26 million of net revenue obtained by Transport Canada from the same facility in fiscal 1993.

In the calculation of gross revenue (on which rent will be based), there are 10 deductions which I am advised are unusual in commercial transactions.

Sole Purpose Corporation: The lease does not restrict the freedom of T1 T2 Limited Partnership to carry out an undertaking other than the management, operation and maintenance of Terminals 1 and 2. Therefore, the financial health of T1 T2 Limited Partnership could be adversely affected by the financial failure of a venture which has nothing to do with the management, operation and maintenance of Terminals 1 and 2.

The Obligation to Maintain and Upgrade: The primary obligation on the Tenant is to operate Terminals 1 and 2 as a "first class air terminal". This standard, to which the Government of Canada can hold the Tenant, is that of "an air terminal facility that embodies the then current standards of air terminal facilities at major international airports and provides a high standard of services to the public and to air carriers". This obligation is subject to the qualification that the Tenant be able to recover its cost together with an investment return on such cost through incremental revenues derived from occupants, user charges or other revenue sources related to the T1 T2 complex.

The Passenger Threshold: The Government of Canada undertakes not to permit development of any airport facility within 75 km of the T1 T2 complex that would reduce passenger traffic at Pearson by more than 1.5 million persons per year, until the volume of passenger traffic at Pearson reaches 33 million people per year. Present projections predict this number to be reached by approximately the year 2005. If the Government of Canada chooses to engage in such proscribed development, it must either pay economic loss to the Tenant or provide the Tenant with access to Area 4 at Pearson, an area explicitly excluded from the RFP.

Remedies for Default: The Government of Canada, in the event of default, could enter the premises and operate them for the purposes of curing the default or terminate the lease. These are the two main remedial avenues available.

The Leasehold Mortgage: The Tenant has certain rights to enter into a leasehold mortgage with one or more lending institutions. If the mortgagee enforces its security it need not complete further stages of construction, and no consent of the Government of Canada is required if the

mortgage assigns, leases or sublets the premises.

The Development Agreement

The Stages of the Project: Stage 1A is to commence within 30 days of the commencement date of the transaction and is to cost \$100 million. Stage 1B is to commence within 19 months of the commencement date and is to cost \$240 million. Stage 2 is to commence only after the number of passengers moving through Pearson has reached 22.4 million annually. This stage is to cost \$200 million. Stages 3 and 4 are to commence only after the passenger volume reaches 24.2 million annually and is to cost \$160 million.

Air Canada Default/Passenger Facility Charge (PFC): If Air Canada ceases to pay its rent due to inability to pay and a Stage is scheduled to commence and is required by the Government of Canada to commence, T1 T2 Limited Partnership is entitled to request the right to charge a PFC (i.e., an individual traveller charge) to provide the minimum revenue stream for the development. If the consent of the Government of Canada to apply a PFC is refused, T1 T2 Limited Partnership need not proceed with the development.

Terminal 1: T1 T2 Limited Partnership is obligated to keep Terminal 1 open until the commencement of Stages 3 and 4, estimated to be in 1999. If the capital cost of keeping T1 operational exceeds \$15 million the Government of Canada is obliged to pay one third of the excess. Should the passenger triggers for Stages 2, 3 and 4 be delayed, the obligation to keep T1 operational may well extend beyond 1999 at some cost to the Government of Canada. The RFP provided for no Government payments.

Non-Arms Length Transaction: About the end of September, 1993, T1 T2 Limited Partnership represented to the Government that it had entered into 10 contracts with non-arms length parties prior to October 7, 1993. One of these was said to be a construction management agreement with Matthews Construction. This information was not publicly disclosed. The Government has the right to see such contracts, but no further right in connection with them. The Government did not seek to exercise this minimal right in connection with the construction management agreement. Recently T1 T2 Limited Partnership has indicated that the construction project will in fact be tendered.

For non-arms length contracts entered into after October 7, 1993, the Government of Canada has no right to veto such contracts but only the right after the fact of the making of such contracts to require that they be at fair market value.

The Management and Operations Agreement

Pricing to the Airlines: The Tenant agrees not to impose fees and charges with respect to the use by air carriers of the T1 T2 complex inconsistent with the agreed pricing policy which is in essence a cost plus pricing policy. Clearly, costs to the airlines for their use of T1 T2 will rise very substantially by comparison with today.

Retail Pricing Policy: The standard concession lease will require that sub-tenants not be entitled to charge more than 15% above the average price of a comparable product offered in downtown Toronto.

Parking Pricing Policy: Public parking prices at T1 T2 shall conform with a price ceiling based on prices charged at not less than 10 major parking facilities in downtown Toronto. Current parking pricing is considerably below such a ceiling.

3. COMMENTS AND OPINION ON THE PROCESS

After permitting the privatization of Terminal 3 at Pearson, the process to privatize Terminals 1 and 2, the remainder of the largest airport in Canada, is inconsistent with the major thrust of the policy of the Government of Canada announced in 1987.

The RFP having as it did only a single stage and requiring proponents to engage in project definition as well as proposal submission and, all within a 90-day time frame, created, in my view, an enormous advantage to a proponent that had previously submitted a proposal for privatizing and developing T1 and T2. Other management and construction firms not having been involved in the manoeuvering preceding the RFP had no chance to come up to speed and submit a bid in the short time permitted. With little construction and development occurring others should have been sought out and given reasonable time to participate.

Further, it is significant that no financial pre-qualification was required in this competition. For a project of this magnitude the selection of a "best overall acceptable proposal" without complete assurance of financial viability seems to me to have been highly unusual and unwise.

Finally, the concluding of this transaction at Prime Ministerial direction in the midst of an election campaign where this issue was controversial, in my view flies in the face of normal and honourable democratic practice. It is a well known and carefully observed tradition that when governments dissolve Parliament they must accept a restricted power of decision during the election period. Certainly the closing of a transaction of significant financial importance, sealing for 57 years the privatization of a major public asset should not have been entered into during an election campaign.

In summary, it is my opinion that the process to privatize and redevelop Terminals 1 and 2 at Pearson fell far short of maximizing the public interest.

4. THE POLITICS OF THE PROCESS

Because of the public controversy surrounding the awarding of this project, the politics of the process must be focused on.

The Role of Patronage: Donald Matthews, the principal of Paxport Inc., was Chairman of the Mulroney leadership campaign in 1983, President of the Progressive Conservative Party and Chief Fundraiser for that Party. Otto Jelinek, a Cabinet Minister in the Progressive Conservative government, did not seek re-election and is now on the board of Paxport Inc. and President of their Asian subsidiary. This, together with the flawed process I have described, understandably may leave one with the suspicion that patronage had a role in the selection of Paxport Inc.

The Role of the Lobbyists and Political Staff: It is clear that the lobbyists played a prominent part in attempting to affect the decisions that were reached, going far beyond the acceptable concept of "consulting". When senior bureaucrats involved in the negotiations for the Government of Canada feel that their actions and decisions are being heavily affected by lobbyists, as occurred here, the role of the latter has, in my view, exceeded permissible norms. As well, there was the perception that political staff were interested in this transaction to a highly unusual extent. Indeed this climate of pressure resulted in several civil servants being re-assigned or requesting transfer from the project.

The role of Competition: It must be remembered that the RFP implicitly indicated that competition between the lessee of Terminals 1 and 2 and Claridge, the lessee of Terminal 3, was desirable. Moreover, Paxport Inc. based its "best overall acceptable proposal" heavily on its competitive position vis-a-vis Terminal 3. However, after succeeding in the competition, Paxport Inc. could proceed only after Claridge took over financial responsibility for the project. Indeed, Claridge, whose bid provided a lower return to the Government of Canada and a lower cost to air Canada, found itself, after losing the bid, forced to accept a less advantageous position to save the Paxport bid. Once again, it appears that Paxport Inc. was receiving unaccountably favourable consideration in that it kept the bid despite the loss of competition.

The Role of the Local Airport Authority: The concept of an LAA has been used in Vancouver, Calgary, Edmonton and Montreal. The Pearson Airport community, the provincial government, local municipalities and business organizations expected a similar policy to be followed. Instead the Minister of Transport declined to recognize the local authority nominated by the Boards of Trade and supported by the local municipalities and regions. This steadfast refusal was based on what, in my view, was minor and normal inter-municipal strife. It is hardly therefore

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surprising that the perception existed that the Government's adamancy that a local airport authority not be recognized was simply to ensure no jeopardy to the award of this project to Paxport Inc.

5. COMMENTS AND OPINION ON THE AGREEMENT

According to a 1987 Transport Canada study, Pearson has a \$4 billion direct economic impact on the economy of the province of Ontario and was directly and indirectly responsible for over 56,000 Ontario jobs. It is by any estimation more than the sum of its parts or the total of its assets and liabilities. It is a critical national gateway and a hub service to travellers, families and shippers. It cannot be duplicated by any other facility in the area, indeed the province or the country. This combination of its economic and social importance to the region, the province and the country, and the fact that it is a unique service for which there is no alternative, transforms the airport, in my opinion, from a simple transportation facility into one of the most important public assets in the southern Ontario and Canadian economy.

Terminal 3 will be privately leased and operated for a further 57 years. To contemplate the privatization of the remaining two Terminals of this public asset is, in my view, contrary to the public good. Only by ensuring that the redevelopment and operation of T1 and T2 are in the hands of a body with considerable responsiveness to the broadly defined public interest can the Government of Canada properly discharge its obligation to the region, the province and the country.

This agreement proposes to turn over this asset to T1 T2 Limited Partnership for 57 years. The length of this leasing arrangement is difficult to fathom. Capital repayment requirements will be met long before the term of the lease expires. Technological change suggests that inevitably transportation will be undertaken very differently 57 years from now. Compare today's transportation to that of 1935. With an asset as moved by technological change as an airport, the length of this obligation does not serve the public interest.

The revenue stream provided to the Government of Canada by this agreement is far from overwhelming. In the immediate term, the rentals received will in fact be less than in recent years. As the lease unfolds, the rental stream is highly dependent on aggressive pricing conducted essentially without government control and at the risk of making Pearson uncompetitive with competitor airports in Canada and the United States.

On the other hand, as I have been advised by my business valuation advisor the rate of return provided to T1 T2 Limited Partnership could, given the nature of this transaction, well be viewed as excessive.

Failure to make public the full identity of the participants in this agreement and other salient terms of the contract inevitably raises public suspicion. Where the government of Canada proposes

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to privatize a public asset, in my opinion, transparency should be the order of the day. The public should have the right to know the full details of the agreement.

The agreement contains a constraint on alternative airport development within a 75 km radius of Pearson. This may well constrain desirable policy initiatives on the part of the Government at southern Ontario airports that must, for planning purposes, all be considered part of a single system. Moreover, the constraint is relatively absolute until Pearson is processing 33 million passengers per year, guaranteeing no ability on the part of the Government of Canada to alleviate the pressures of growth until that point is reached. This is despite staff opinion recorded in the submission to Treasury Board that pressure for such alleviation would commence when the 30 million per year figure is reached. Not only will the limitation constrain possible desirable policy initiatives, but it may well ensure overcrowding at Pearson.

The agreement provides only modest constraint against self dealing on the part of the partners. The agreement provides no ability to modify non-arm's length contracts in existence before October 7, 1993. For such contracts entered into after October 7, 1993, the Government of Canada has no prior veto right but only the right to complain after the fact.

The performance obligations on T1 T2 Limited Partnership are, perhaps necessarily, broadly phrased. The obligation to maintain and operate a first class air terminal is necessarily general. It will inevitably be difficult for the Government of Canada to determine when that obligation has been breached. Moreover, thereafter the main remedial avenues available to the Government of Canada are either to cancel the Ground Lease completely or operate the airport itself, both of which are draconian remedies which, in my view, are unlikely ever to be exercised.

Finally, this agreement presents very disadvantageous precedential value to the Government of Canada in dealing with local airport authorities that now operate a number of major airports across the country under conditions far more favourable to the Government of Canada than this agreement. It will in my view create a major pressure on the federal government to amend its relationships with those local airport authorities to give them as favourable treatment.

In summary, taking these matters together, it is my opinion that this agreement simply does not serve the public interest.

6. CONCLUSION

My review has left me with but one conclusion. To leave in place an inadequate contract, arrived at with such a flawed process and under the shadow of possible political manipulation, is unacceptable. I recommend to you that the contract be cancelled.

7. THE FUTURE

Although no formal cancellation clause was included in the agreement, I believe it reasonable, if you agree with my recommendation, for your representatives to approach the principals of T1 T2 Limited Partnership and inform them of your decision, to be implemented through negotiation or by referring the matter to Parliament. I am confident the former will result in a reasonable conclusion. The senior executiveS of T1 T2 Limited Partnership are responsible and professional business people.

In my view, it would be both necessary and indeed desirable to provide reasonable compensation. Let me suggest that this would include the expenditures incurred to date by T1 T2 Limited Partnership. It would not be necessary in my view for these negotiations to include compensation for lost opportunity or profits foregone. Given the circumstances of this unhappy transaction, and the very early stage of its life, there is no imperative for such compensation.

I further recommend that Transport Canada continue for the time being to administer Terminals 1 and 2, and proceed with necessary construction. Thereafter I recommend that Transport Canada recognize the Airport Authority. Once operational, the Airport Authority would receive from Transport Canada the responsibility of the day to day operations of the airport complex. It would also deal with the planning, financing and construction of airport infrastructure. In particular, this would include Terminals 1 and 2 and the runways, taxiways and aprons at Pearson.

Terminal 3 would remain in private hands.

The Airport Authority I am recommending is an expansion of the concept already in use in other communities. Because of the size and importance of Pearson to the Toronto region, the province of Ontario and Canada itself, it is my view that the provincial and federal governments should have direct representation on the Authority. The presently constituted Greater Toronto Region Airport Authority already represents business and the community at large of the five regions. The five present vacancies on the board of that Authority should be filled, in my view, by two members appointed by the Minister of Transportation Ontario, and three members including the Chairman appointed by the Minister of Transport Canada. These members should not be either elected officials or government employees and must perform their duties in the best interest of the Airport Authority.

Such an Authority provides in my view the necessary responsiveness to the broadly defined public interest that is required in the development and operation of Pearson. Moreover, as has been the experience at other Canadian airports, such an Authority would have reasonable access to capital independent of any government guarantee.

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Extensive reviews indicate the need to coordinate the airport facilities in this area of south-central Ontario. The Authority should be authorized to negotiate the inclusion of these airport facilities into its mandate. By accepting the planning jurisdiction of this Authority, these facilities will benefit from capital and operating support available from the Authority to provide for the planning and improvement of the larger system.

The T1 T2 complex is the heart of the Pearson Airport. The future operation and redevelopment of these Terminals must be done in the public interest. It is my recommendation to you that this cannot be done under the present agreement. In the future I trust it can be accomplished.

**PEARSON AIRPORT REVIEW
CONSULTED WITH OFFICIALS FROM THE
FOLLOWING ORGANIZATIONS:**

AIR CANADA
AIR TRANSAT
BRITISH AIRPORTS AUTHORITY
BUTTONVILLE AIRPORT
CANADA AIRPORTS LTD.
CANADA 3000
CITY OF MISSISSAUGA
CITY OF BRAMPTON
CITY OF HAMILTON
CITY OF TORONTO
CLARIDGE
COUNCIL OF CONCERNED RESIDENTS
DELTA AIRLINES
GOVERNMENT OF ONTARIO
GREATER TORONTO AREA REGIONAL CHAIRPERSONS
GREATER TORONTO REGIONAL AIRPORT AUTHORITY
METRO JOB START COALITION
MEMBERS OF PARLIAMENT FROM METRO TORONTO
MISSISSAUGA BOARD OF TRADE
MORRISON HERSFIELD GROUP INC.
PAST TRANSPORT CANADA OFFICIALS
PAXPORT INC.
LEASTER B. PEARSON INTERNATIONAL AIRPORT
PEARSON DEVELOPMENT CORPORATION
FORMER SOUTH CENTRAL ONTARIO AIRPORT AUTHORITY
THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH
THE BOARD OF TRADE-METROPOLITAN TORONTO
TORONTO ISLAND AIRPORT
TRANSPORT CANADA

